

# Nelson Mandela as Negotiator: What Can We Learn from Him?

HAL ABRAMSON<sup>\*</sup>

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## PREFACE

This article considers how “the greatest negotiator of the twentieth century,” Nelson Mandela, approached negotiating the unbanning of the African National Congress (ANC), the dismantling of apartheid, and his own freedom after twenty-seven years of imprisonment. He employed classically good negotiation practices in the face of intense and violent opposition while confined in prison for life. If he could be successful, why cannot lawyers succeed when facing less daunting disputes?

This article focuses on the period starting in 1985, when Mandela refused an offer to be released if he would condemn violence, until 1990, when President de Klerk gave his historic unbanning speech, Mandela was freed, and he gave his first speech as a free man.

## I. INTRODUCTION

Several hours after we landed in Johannesburg, we heard the news that flashed around the globe. Nelson Mandela had passed away. With that announcement on December 6, 2013, we became accidental eyewitnesses to history and participants in ten extraordinary days of mourning, remembrance, and for-learning.<sup>1</sup> On the day of Mandela's burial, we went to the Apartheid Museum in Johannesburg where his exceptional life was vividly presented. The exhibit explored Mandela's life through six overarching themes: character, comrade, leader, prisoner, negotiator, and statesman. The negotiation theme caught my attention. In this article, I examine Mandela as a negotiator from 1985, when he refused an offer to release him from prison if he would denounce violence, until his release in 1990 to see what we can learn from the "greatest negotiator of the twentieth century."<sup>2</sup>

Nelson Mandela's story is one of legendary proportions. After a lifetime as a freedom fighter, twenty-seven years in prison, and only four years after his release, he became South Africa's first democratically elected President at the age of seventy-four years old.<sup>3</sup> While he was known internationally as Nelson Mandela, he was known locally as "Tata," meaning "the father," and "Madiba," his clan name.<sup>4</sup>

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\*Professor of Law, Touro Law Center, New York, *see* [www.tourolaw.edu/faculty/abramson](http://www.tourolaw.edu/faculty/abramson). He wants to recognize the valuable comments on earlier drafts by Judge Richard Goldstone and John Brand from South Africa. He also wants to thank Avi Waldman for her editing suggestions and two Touro law students for their superb contributions, Matthew Ingber for his research assistance and Amanda Spinner for her research assistance and for verifying and putting footnotes in proper form.

<sup>1</sup> Harold I. Abramson, *Accidental Witness to History: My Trip to South Africa*, Scholarly Works Paper 593, DIGITAL COMMONS @ TOURO LAW CENTER (2014), <http://digitalcommons.tourolaw.edu/cgi/viewcontent.cgi?article=1678&context=scholarlyworks>.

<sup>2</sup> *See* ROBERT MNOOKIN, *BARGAINING WITH THE DEVIL: WHEN TO NEGOTIATE, WHEN TO FIGHT* 134–35 (2010) (conferring this title).

<sup>3</sup> NELSON MANDELA, *LONG WALK TO FREEDOM: THE AUTOBIOGRAPHY OF NELSON MANDELA* 620–21 (1995).

<sup>4</sup> *Names*, NELSON MANDELA FOUND., <https://www.nelsonmandela.org/content/page/names> (last visited Apr. 10, 2016).

Nelson Mandela faced the most challenging dispute for any negotiator—a distributive one. And not just one. He faced several: he was either in or out of prison; he either renounced the armed struggle or not; his organization, the African National Congress (ANC), was banned or not; and majority rule was adopted or not. The resolution of each of these issues would result in a winner and loser, and he was determined to win each one. He also faced an agonizing conflict of interest. He endured numerous temptations to compromise the interests of his country to achieve his personal freedom. As I probed how Mandela handled these distributive challenges, his distinctive negotiation approach emerged.

To begin unpacking Mandela's approach, I examine his first speech as a free man.<sup>5</sup> He gave this historic speech at Cape Town City Hall to a worldwide audience. City Hall also was the location of the first memorial service that I attended. We listened to eyewitness recollections of that day, February 11, 1990, when Mandela was seen and spoke in public for the first time since he was incarcerated at Robben Island at the robust age of forty-six.<sup>6</sup> The last published picture of Mandela was seen in 1962 at the age of around forty-four.<sup>7</sup> He reappeared on the balcony of City Hall at the age of seventy-one.<sup>8</sup>

When viewed through a negotiation lens, the speech is revealing.<sup>9</sup> His remarks succinctly captured the arc of apartheid history, from its oppressive

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<sup>5</sup> Padraig O'Malley, *Remarks by Nelson Mandela in Cape Town on February 11, 1990 After his Release from Victor Verster*, NELSON MANDELA FOUND., <https://www.nelsonmandela.org/omalley/index.php/site/q/03lv03445/04lv04015/05lv04154/06lv04191.htm> (last visited Apr. 10, 2016).

<sup>6</sup> Mandela was born on July, 18, 1918. In his autobiography, he noted that when he was being taken on local trips, no one recognized him because his last published picture of him was taken in 1962. See MANDELA, *supra* note 3, at 533.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> The speech received decidedly mixed reviews. See PATTI WALDMEIR, *ANATOMY OF A MIRACLE: THE END OF APARTHEID AND THE BIRTH OF THE NEW SOUTH AFRICA* 157 (1997) (Patti Waldmeir, the journalist and author who was present at the speech, said it was written by a committee deeply suspicious of de Klerk that "had penned a speech from hell, a speech without warmth, vision, humanity; a speech for the warpath . . . . Mandela was a disappointment."); See MARTIN MEREDITH, *NELSON MANDELA: A BIOGRAPHY* 405–06 (1997) (concluding, "It was a speech which raised doubts about the quality of Mandela's leadership . . . . To whites, the speech seemed needlessly militant. To many blacks, it seemed ambiguous . . . (was he calling for arms or negotiations?)"); TOM LODGE, *MANDELA: A CRITICAL LIFE* 168 (2006) (noting that "Margaret Thatcher . . . expressed dismay at 'the old ritual phrases . . .' de Klerk felt that 'for once, Mandela completely failed to rise to the occasion.'"); Lodge concluded that this collectively scripted statement was not written for them. It was written to reassure Mandela's South African constituency); ANTHONY SAMPSON, *MANDELA: THE AUTHORIZED BIOGRAPHY* 403 (2000) (noting that he

beginnings to his aspirations for the future, while unveiling in his words his approach to negotiating freedom for his country and himself. For anyone steeped in South African history, the underlying events are well known.<sup>10</sup> The events and speech are assessed in this article against good negotiation practices.<sup>11</sup>

## II. THE POWER OF THE BATNA (BEST ALTERNATIVE TO A NEGOTIATED AGREEMENT)

The first sentence that caught my attention called for the continuation of the armed struggle: “Our resort to the armed struggle in 1960 with the formation of the military wing of the ANC . . . was a purely defensive action . . . . The factors which necessitated the armed struggle still exist today. We have no option but to continue.”<sup>12</sup>

This declaration surprised and perplexed me. He made it on the day of his release and a week after President de Klerk met all of the ANC’s pre-conditions for negotiations in his monumental Parliamentary speech, known as the unbanning speech.<sup>13</sup> Violence as a strategy is spurned by professional dispute resolvers, so to hear it advocated by one of the great peacemakers of our time was jarring. His view contrasts starkly with the other two great peacemakers, Mahatma Gandhi and Martin Luther King Jr., who were admired for their abiding commitment to civil disobedience.

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had to show his solidarity with the ANC because of the fears generated by the secret talks. He needed to reaffirm the use of the tools that gave him leverage-sanctions and the armed struggle. In Mandela’s authorized biography, Anthony Sampson said that any disappointment with the speech “betrayed ignorance about Mandela’s relationship with the ANC, and his true political importance . . . .”.

<sup>10</sup> See generally MANDELA, *supra* note 3 (Mandela’s life has been thoroughly studied by many observers and historians, including Mandela in his thoughtful autobiography). See also LODGE, *supra* note 9; MEREDITH, *supra* note 9; WALDMEIR, *supra* note 9; SAMPSON, *supra* note 9; MNOOKIN, *supra* note 2, at 106–36; ALLISTER SPARKS, *TOMORROW IS ANOTHER COUNTRY* (1995); F. W. DE KLERK, *THE LAST TREK—A NEW BEGINNING: THE AUTOBIOGRAPHY* (1998).

<sup>11</sup> See generally HAROLD I. ABRAMSON, *MEDIATION REPRESENTATION: ADVOCATING AS A PROBLEM-SOLVER* (3d ed. 2013) (discussing good practices. Chapter 1 compares the two widely used negotiation approaches, positional and problem-solving and suggests how to integrate the two into a unified approach. The chapter summarizes various negotiation practices including the good ones along with numerous cites from key literature in the negotiation field.).

<sup>12</sup> O’Malley, *supra* note 5.

<sup>13</sup> *Organisations Unbanned*, NELSON MANDELA FOUND. (Jan. 1, 2015), <https://www.nelsonmandela.org/news/entry/organisations-unbanned>.

*Nelson Mandela endorsed the use of violence early in his life as a freedom fighter. But why, in what form, and for how long?*

Mandela understood one of the basic tenets of negotiations: your negotiating power is fueled by the strength of your alternative to settlement, known as the BATNA (Best Alternative to a Negotiated Agreement).<sup>14</sup> He realized that parties will negotiate when the outcome at the table will be better than the outcome away from the table. The ANC wanted to negotiate. The status quo away from the table was horrific—continuation of the personally and economically oppressive and violent apartheid policies. They had a weak BATNA. The Nationalist Government did not want to negotiate. They preferred the status quo away from the table. It meant that the white minority would maintain control with all of its benefits over the majority of the population. They had an appealing BATNA.

Mandela and the ANC needed to change the Government's alternative to a negotiated solution. He endorsed an armed struggle in order to induce the Government to come to the table. Mandela recognized that, "[W]e could not defeat the Government on the battlefield, but could make governing difficult for them."<sup>15</sup>

Mandela did not begin his freedom-fighting career wedded to armed resistance. When helping to organize the first mass demonstrations against the new apartheid laws in 1952, Mandela adopted a nonviolent approach as a tactic that fit the conditions.<sup>16</sup> He arrived at this pragmatic conclusion in a committee discussion that considered whether a policy of nonviolence was an ethical and morally superior principle that should be unconditionally followed.<sup>17</sup> Mandela rejected the Gandhian principle in a meeting that included Manilal Gandhi, Mahatma's son.<sup>18</sup> Advocating for a nonviolent campaign similar to his father's in India, Gandhi endorsed a commitment to key Satyagraha ("truth-firmness") principles of nonviolence.<sup>19</sup> Mandela, however, saw "nonviolence

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<sup>14</sup> ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 99–108 (Bruce Patton ed., 2011). See MNOOKIN, *supra* note 2, at 29–30.

<sup>15</sup> MANDELA, *supra* note 3, at 520 (explaining this strategy in 1985 when he was visited in prison by Samuel Dash, a professor of law at Georgetown University and former counsel to the U.S. Senate Watergate Committee).

<sup>16</sup> *See id.* at 127–28.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

in the Gandhian model not as an inviolable principle but as a tactic to be used as the situation demanded . . . for [as] long as it was effective.”<sup>20</sup>

Mandela took the lead in meticulously training supervisors and organizing the nonviolent demonstrations. During the six months of demonstrations, the organizers were proud that there was not a single act of violence by any of the resisters due to their exemplary discipline.<sup>21</sup>

In the following year, Mandela crossed the line in his rhetoric. He publically endorsed violent resistance in a rabble-rousing speech to a large crowd with a pronounced police presence.<sup>22</sup> Mandela said,

[T]hat the time for passive resistance had ended, that nonviolence was a useless strategy and could never overturn a white minority regime bent on retaining its power at any cost. . . . [V]iolence was the only weapon that would destroy apartheid and we must be prepared, in the near future, to use that weapon.<sup>23</sup>

The ANC’s National Executive Committee reacted swiftly to this unilateral pronouncement and severely reprimanded Mandela for departing dangerously from accepted ANC policy.

At the time of his remarks, he had begun to analyze the struggle differently:

The ambition of the ANC was to wage a mass struggle, to engage . . . in a campaign so large and powerful that it might overcome the status quo of white oppression. But the Nationalist government was making any legal expression of dissent or protest impossible. I saw that they would ruthlessly suppress any legitimate protest. . . . A police state did not seem far away.<sup>24</sup>

He distinguished South African conditions from conditions in India:

Gandhi had been dealing with a foreign power that ultimately was more realistic and farsighted. . . . Nonviolent passive resistance is effective so long as your opposition adheres to the same rules as you do. But if peaceful protest is met with violence, its efficacy is at an

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<sup>20</sup> *Id.* at 128.

<sup>21</sup> *Id.* at 123, 127–28, 138–39.

<sup>22</sup> *Id.* at 157–58.

<sup>23</sup> *Id.* at 157.

<sup>24</sup> *Id.*

end. . . . [T]here is no moral goodness in using an ineffective weapon.<sup>25</sup>

During his later years in prison, in 1985, Mandela explained how the conditions under which Martin Luther King and he struggled were “totally different” too.<sup>26</sup> “The United States was a democracy with constitutional guarantees of equal rights that protected nonviolent protest . . . ; South Africa was a police state with a constitution that enshrined inequity and an army that responded to nonviolence with force.”<sup>27</sup>

The nonviolence policy was maintained by Mandela and the ANC until the deadly 1960 Sharpeville Massacre of black protestors.<sup>28</sup> In response, the ANC formed a military wing, Umkhonto we Sizwe (which is Zulu for “Spear of the Nation” and was known as “MK”), and Mandela became its co-founder and head.<sup>29</sup> In its manifesto, MK declared:

We shall not submit and we have no choice but to hit back by all means within our power in defence of our people, our future, and our freedom. The government has interpreted the peacefulness of the movement as weakness; the people’s non-violent policies have been taken as a green light for government violence . . . . Umkhonto we Sizwe will be at the front line of the people’s defense. It will be the fighting arm of the people against the government and its policies of race oppression.<sup>30</sup>

In Mandela’s often cited speech at the Rivonia Trial where he was sentenced to life in prison, Mandela admitted to the use of violence and justified its use:

I do not, however, deny that I planned sabotage. I did not plan it in a spirit of recklessness nor because I have any love of violence. I planned it as a result of a calm and sober assessment of the political

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<sup>25</sup> *Id.* at 158, 166. See NORMAN G. FINKELSTEIN, WHAT GHANDI SAYS: ABOUT NONVIOLENCE, RESISTANCE, AND COURAGE, 32–45 (2012) (concluding from Gandhi’s writings that while Gandhi’s commitment to nonviolence was primary, it was not unconditional. Gandhi recognized exceptions based on the need for courage and self-defense. The author also identified contradictions in his writings.).

<sup>26</sup> See *id.*

<sup>27</sup> MANDELA, *supra* note 3, at 520–21, 568, 574.

<sup>28</sup> See *id.* at 271–74.

<sup>29</sup> See *id.* at 280.

<sup>30</sup> Padraig O’Malley, *Manifesto Of Umkhonto we Sizwe*, NELSON MANDELA FOUND., <https://www.nelsonmandela.org/omalley/index.php/site/q/03lv02424/04lv02730/05lv02918/06lv02950.htm> (last visited Apr. 10, 2016). See MANDELA, *supra* note 3, at 274.

situation that had arisen after many years of tyranny, exploitation, and oppression of my people by whites.<sup>31</sup>

In planning MK's activities, the High Command identified four levels of violence,<sup>32</sup> and started with sabotage because it would cause the least harm to human life. MK initially targeted, with handmade bombs, electric power plants and government offices in several cities. If sabotage did not produce the desired results, MK would move to the next stages of guerrilla warfare and terrorism.<sup>33</sup>

Nevertheless, Mandela believed that ultimately apartheid would not be defeated by an armed struggle; he understood its limits. It would be defeated by negotiation. The ANC lacked the military power to remove the Nationalist Party from governing. It could only make the country ungovernable, and nonviolence and passive resistance alone had achieved little.<sup>34</sup> Mandela "hated violence but was not a pacifist. . . . He understood the power of violence and used it strategically—to force the government to negotiate."<sup>35</sup>

Mandela could not single-handedly shape a negative BATNA for the Government. He could not do much personally because he was incarcerated shortly after the Sharpeville Massacre. The negative BATNA had to be forged on multiple fronts by numerous anti-apartheid leaders and sympathizers. Much action took place in the streets and courtrooms of South Africa and in legislative bodies and the United Nations outside of South Africa. Each action has been given a name in the history of the anti-apartheid movement and encapsulates a consequential chapter of the "Long Walk to Freedom."<sup>36</sup> They collectively formed a negative BATNA for the Government. Several of the chapters and key leaders are mentioned here and further described in Appendix A on the Negative BATNA for the Nationalist Government:

-1960. The *Sharpeville Massacre* brought global attention to the conditions under apartheid when the police killed sixty-nine protestors

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<sup>31</sup> MANDELA, *supra* note 3, at 364.

<sup>32</sup> See *id.* at 271–74, 282–86, 364–65, 520 (explaining sabotage, guerrilla warfare, terrorism, and open revolution).

<sup>33</sup> See *id.*; MNOOKIN, *supra* note 2, at 117–18.

<sup>34</sup> MANDELA, *supra* note 3, at 364–65, 520–21.

<sup>35</sup> MNOOKIN, *supra* note 2, at 135. See *Mandela: Character, Comrade, Leader, Prisoner, Negotiator, Statesman, APARTHEID MUSEUM*, <http://www.apartheidmuseum.org/sites/default/files/files/downloads/theme5.pdf> (last visited Apr. 10, 2016) (emphasizing that "Bringing the apartheid regime to the negotiating table was Mandela's guiding objective. He always made it very clear that he regarded armed struggle as a tactic . . .").

<sup>36</sup> See generally MANDELA, *supra* note 3.



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within two minutes—most of whom were shot in the back as they were fleeing. These shootings changed the landscape for fighting apartheid as both the intensity of protests and the responses by the Nationalist Government escalated in full view of the world.<sup>37</sup>

-1961. *Umkonto We Sizwe* (Spear of the Nation) (MK), a military wing of the ANC, was organized in the wake of the Sharpeville Massacre.<sup>38</sup>

-1962–1964. The *Rivonia Trial* brought further international attention to the oppressive apartheid conditions. The Nationalist Government charged Mandela and other ANC leaders with sabotage, violent revolution, and conspiracy with others. The Trial engendered much international condemnation including from the United Nations Security Council.<sup>39</sup>

-1969–1977. The *Black Consciousness Movement* (BCM), marked by the formation of the South African Student Organization in 1969 and co-founded by activist Steve Biko, transformed student discontent into a political force and shifted attention from the ANC priority on non-racialism to black pride and black self-reliance. The BCM spurred a new era of activism in the face of aggressive clamping down by the Nationalist Government, culminating in Biko's brutal September 1977 death in police custody.<sup>40</sup>

-1976. The *Soweto Student Uprising* triggered violent protests and mass resistance to apartheid throughout South Africa. The uprising erupted in June 1976 when high school students protested against introduction of Afrikaans as the medium of instruction.<sup>41</sup>

-1985. Mandela rejected President Botha's offer to be released if he would denounce violence.<sup>42</sup>

-1983–1990. The *United Democratic Front* (UDF), a coalition of organizations, led much of the internal resistance while the ANC was banned. The UDF, in an effort to render the country ungovernable, mobilized people and organizations across the country. More than 600

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<sup>37</sup> *Id.* at 236–39. See *infra* App. A.

<sup>38</sup> See *infra* App. A.

<sup>39</sup> MANDELA, *supra* note 3, at 360–78.

<sup>40</sup> See *infra* App. A.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

organizations joined, including labor, political, youth, women's, religious, civic, and student and teacher organizations. The Government believed that the UDF was created by the ANC, although the UDF was ultimately viewed as independent.

-1960–1990. International sanctions and economic and political isolation, dating back to the Sharpeville Massacre, escalated as each chapter unfolded.<sup>43</sup>

In addition to these events, numerous anti-apartheid leaders and sympathizers acted boldly while putting their professional and personal lives at risk, with some paying the ultimate price for their actions. Each name is renowned in the anti-apartheid movement. They collectively contributed greatly to shaping the negative BATNA that Mandela understood was essential for persuading the Nationalist Government to come to the table. Only a few of the many courageous leaders are mentioned here, although many more made profound contributions,<sup>44</sup> including some under the public radar.<sup>45</sup>

-Chief Albert Luthuli was the early President of the ANC and received the 1960 Nobel Peace Prize.<sup>46</sup>

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<sup>43</sup> *Id.*

<sup>44</sup> For example, Judge Goldstone—whom I met when researching this article—was a sitting judge under apartheid laws and did what he could to interpret the laws to temper its harshness and undermine its effects within the parameters of his judicial role. He later became a confidant to Nelson Mandela after his release. Their friendship grew from Goldstone's activities as the Chairman of the Standing Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation. The Commission made public evidence that senior members of the South African Army and Police were involved with attempts to abort the negotiation process.

<sup>45</sup> Hundreds of people did what they could within their personal corner of the apartheid world including participating in peaceful or violent protests, aiding someone in flight, signing petitions, or representing victims. For example, our host, John Brand, did what he could as a young associate with a century-old South African law firm, Bowman Gilfillan. He was part of a small group of lawyers that represented hundreds of defendants in the Soweto Uprising and worked with George Bizos, Mandela's personal attorney, and black anti-apartheid leader Shun Chetty, in addition to practicing other professionally-risky legal work for an attorney at a "white-shoe" law firm. In 2006, John Brand successfully petitioned the High Court of South Africa to posthumously reinstate Shun Chetty after Chetty had to flee the country in 1978 for his personal safety and was then disbarred for trumped up charges that included abandoning clients.

<sup>46</sup> See *infra* App. A.

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-Oliver Tambo helped revive the ANC in the early 1940s and lead the ANC while in exile, while Nelson Mandela was in prison.<sup>47</sup>

-Walter Sisulu, active with the ANC, helped lead the Defiance Campaign and transform the ANC into a mass-based militant national organization.<sup>48</sup>

-Stephen Biko, co-founder of the Black Consciousness Movement (BCM), did much to generate black pride and protests, as described above, and his brutal death made him an international martyr in opposing apartheid.<sup>49</sup>

-Winnie Mandela, Nelson's wife, was an energetic, colorful, and controversial force in the anti-apartheid movement, especially when her husband was in prison.<sup>50</sup>

-George Bizos was a human rights lawyer who served as Nelson Mandela's personal attorney throughout much of his life.<sup>51</sup>

-Albie (Albert) Sachs was a human rights lawyer who participated in the Defiance Campaign, the drafting of the Freedom Charter, and defended people charged under apartheid's racist laws.<sup>52</sup>

These people, among many others, made governing difficult and the status quo unbearable for the Nationalist Government. The increasingly negative BATNA spurred the Nationalist Government to reluctantly and intermittently come to the bargaining table to talk with Mandela during his last five years in prison.

In the Cape Town speech, Mandela tied the negative BATNA to the negotiations when he said: "We express the hope that a climate conducive to a negotiated settlement will be created soon so that there may no longer be the need for the armed struggle."<sup>53</sup> After formally sanctioning an armed struggle

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> O'Malley, *supra* note 5. The term "armed struggle" is associated with the ANC efforts, although there was a broader level of violence taking place that was not directed by the ANC. In the rhetoric of violence, the same term had different meanings for different

for almost thirty years, Mandela endorsed suspending it six months after his release in 1990.<sup>54</sup>

### III. NEGOTIATION STYLE OF NELSON MANDELA

*Mandela's negotiation strategies can be classified based on three types of negotiation practices: good practices, tactics, and tricks.*<sup>55</sup>

*Good practices* will likely produce the best negotiated results.<sup>56</sup> They include asserting interests rather than positions, acting ethically and fairly, and building rapport, relationships, and trust on your side of the table and across the table.<sup>57</sup> They also include relying on rational and principled justifications, engaging in suitable information exchanges, and using effective communication techniques such as summarizing, paraphrasing, framing, and questioning.<sup>58</sup>

*Tactics* are conventionally used, not because they are good practices, but because they reflect customary practices.<sup>59</sup> Making extreme first offers to create room for concessions, exaggerating arguments, and denigrating the other side's arguments are examples, along with threatening to leave the negotiation.<sup>60</sup> These practices are generally accepted ones that can offer tactical benefits if they are executed convincingly. Because they are viewed as

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audiences. In the Cape Town speech, Mandela likely used the term because it resonated with his key constituency on that day—the ANC and its sympathizers. For the Nationalist Government and many whites, they heard that Mandela was not denouncing violence, whether generated by the ANC or any other sources.

<sup>54</sup> In August 1990, Mandela endorsed suspending the violent struggle as a concession to demonstrate good faith, improve the climate for negotiations, and secure target dates for meeting particular demands of the ANC. MANDELA, *supra* note 3, at 586. To garner support on his side of the table, he supported suspending, not terminating it. *Id.* De Klerk, in his autobiography, viewed this concession differently. He thought that the ANC made “a common commitment towards the resolution of the existing climate of violence . . . and to a peaceful process of negotiations,” during their first negotiations in May 1990, as expressed in the Groote Schuur Minute. DE KLERK, *supra* note 10, at 182.

<sup>55</sup> ABRAMSON, *supra* note 11, at 22–29, 43–47.

<sup>56</sup> *Id.* at 25–26, 43–44.

<sup>57</sup> Professor Mnookin refers to negotiating as a two-level game where a party is negotiating with people behind the table and across the table. MNOOKIN, *supra* note 2, at 133–34.

<sup>58</sup> See ABRAMSON, *supra* note 11, at App. F.

<sup>59</sup> *Id.* at 26–27, 45–47.

<sup>60</sup> *Id.* at 36–37.

generally accepted practices, if discovered, they do not severely undermine relationships or the negotiation process, as can happen with tricks.

*Tricks* are neither good practices nor conventionally accepted ones.<sup>61</sup> Tricks are unethical and highly risky. When executed convincingly, they can be effective. If discovered, they can severely undermine, if not destroy, the relationship with the target and the negotiation process. Tricks can include lying about material facts, employing such games as good guy/bad guy roles, and arriving purposely without sufficient settlement authority.<sup>62</sup>

There is no agreed upon list of tactics or tricks. Although most people can probably agree which moves can be labeled as tactics, people agree less on which moves are tricks. The move needs to be assessed. The answer can depend on the context of its use and the experience of the target. Some people may view insufficient settlement authority as a tactic; others might see it as a trick, as I do, for instance. If the target views the move as a trick, it can affect whether and how the matter can be settled.

The strategies selected by a negotiator define his particular style over a continuum of good practices, tactics, and tricks. Studies have shown that the more negotiators engage in practices toward the good practices and tactics end of the continuum, the more effective the negotiator can be.<sup>63</sup>

### A. Good Practices

*Mandela, in his Cape Town remarks and during the secret negotiations, employed several strategies and moves that were good practices.*

#### 1. ADVOCATING INTERESTS

Mandela uncompromisingly advocated his primary interests in the liberation of South African blacks in the face of potent temptations to sacrifice them to meet his interest in personal liberation. An interest of a party, as defined in the negotiation literature,<sup>64</sup> focuses on a party's needs instead of particular solutions that can be contested by the other side. By focusing on interests, parties are more likely to uncover multiple solutions of which some might be acceptable or tolerable to the other side. Mandela advocated his primary interests while priming the other side with possible solutions that he would prefer.

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<sup>61</sup> *Id.* at 27–28, 46–47.

<sup>62</sup> *Id.* at 38.

<sup>63</sup> *Id.* at 2–3.

<sup>64</sup> FISHER & URY, *supra* note 14, at ch. 3.

In his Cape Town speech, he firmly set out the primary interests. He spoke about the need “for a democratic, nonracial, and unitary South Africa.”<sup>65</sup> He called for “an end to white monopoly on political power and a fundamental restructuring of our political and economic systems to ensure that the inequalities of apartheid are addressed and our society thoroughly democratized,” including universal suffrage.<sup>66</sup> He also repeated the interests articulated in his speech at the 1964 Rivonia trial where he expressed how he cherished the idea of a democratic and free society where people live together in harmony and with equal opportunities.<sup>67</sup>

He relentlessly advocated for replacing apartheid with a democracy for almost fifty years even as obstacles relentlessly mounted. His primary goal of establishing a democracy has a long history dating back to his formative years as a freedom fighter in 1943–1944.<sup>68</sup> He advanced this interest in: the 1955 Freedom Charter,<sup>69</sup> the 1961 Manifesto establishing the military arm of AMC,<sup>70</sup> his famous “I am prepared to die” remarks at the 1964 Rivonia Trial,<sup>71</sup>

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<sup>65</sup> O’Malley, *supra* note 5.

<sup>66</sup> *Id.*

<sup>67</sup> Nelson Mandela, *Nelson Mandela’s Statement From the Dock at the Opening of the Defense Case in the Rivonia Trial*, AFRICAN NAT’L CONG., <http://www.anc.org.za/show.php?id=3430> (last visited Apr. 10, 2016).

<sup>68</sup> In 1944, Mandela helped form a Youth League for the ANC, with a manifesto that focused on overthrowing white supremacy and establishing a “truly democratic form of government.” MANDELA, *supra* note 3, at 98–100.

<sup>69</sup> The Freedom Charter was prepared by a committee of the National Action Council (a coalition of diverse organizations) and reviewed by ANC’s National Executive Council in 1955. *Id.* at 170–76. It was scheduled to be presented and subject to vote by the Congress of the People at a convention of around 3,000 delegates. *Id.* The meeting attended by Mandela was disbanded by a brigade of police before a formal vote. *Id.* The Freedom Charter nevertheless lived on as an enduring political statement. *Id.* The Freedom Charter provided that the people shall govern and set out multiple requirements for a democratic South Africa including that any rights ought to be the same regardless of race, colour, or sex. *Id.*

<sup>70</sup> The 1961 Manifesto of Umkhonto we Sizwe (MK), which Mandela helped to draft, stated that they were working for the “winning of liberty, democracy and full national rights and equality for all the people of this country.” O’Malley, *supra* note 30.

<sup>71</sup> At the end of his four-hour presentation justifying why he joined the freedom struggle, Mandela gave his famous remarks that he quoted in his 1990 Cape Town speech: he “cherished the ideal of a democratic and free society in which all persons will live together in harmony and with equal opportunities . . . . But if needs be, it is an ideal for which I am prepared to die.” O’Malley, *supra* note 5. See Mandela, *supra* note 67.

and his remarks read by his daughter when he rejected Botha's conditional release offer in 1985.<sup>72</sup>

He encountered one of his greatest temptations to compromise his primary interest in 1985 when President Botha offered Mandela an opportunity to be released from prison after twenty-one years. Botha imposed only one condition: Mandela had to publicly reject violence as a political weapon.<sup>73</sup>

This offer was made three years after Mandela was upgraded from Robben Island, where he had slept for eighteen years on a floor mat in a tiny cell, to Pollsmoor Prison that Mandela described as a five-star hotel when compared to Robben Island.<sup>74</sup> At Pollsmoor, Mandela and three of his comrades were given the top floor with regular beds, much improved food, and considerable freedom of movement. They were given access to a fairly wide range of newspapers and magazines, including for the first time foreign sources like *Time Magazine* and *The Guardian*. Mandela had his first physical contact in twenty-one years with Winnie and his family, an especially moving and indelible moment.<sup>75</sup> The authorities apparently wanted to remind Mandela how life out of prison could be and what he was missing as they tested negotiating with him.

Mandela rejected the conditional offer of release in a speech read by his daughter, Zindzi, at a public rally of supporters.<sup>76</sup> Mandela explained how this offer was not an offer to be freed, and in doing so, he highlighted his primary interest. He focused on what the offer would not give him when he left the prison. His organization would still be banned. He could be arrested on a pass offense. His wife would still be banished in Brandfort. He would need to ask permission to live in an urban area. His own South African citizenship would not be respected. This offer was not one to free him, he emphasized.

In confronting his conflicting interests, he prioritized freedom for everyone else over his personal freedom:

I cherish my own freedom dearly, but I care even more for your freedom. Too many have died since I went to prison. Too many have suffered for the love of freedom. I owe it to their widows, to their orphans, to their mothers and to their fathers who have grieved and wept for them. Not only I have suffered during these long, lonely,

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<sup>72</sup> Pete Brook, *Mandela's 1985 Refusal Of Release From Prison*, PRISON PHOTOGRAPHY (Dec. 5, 2013), <http://prisonphotography.org/2013/12/05/mandelas-1985-refusal-of-release-from-prison/>.

<sup>73</sup> See MANDELA, *supra* note 3, at 521.

<sup>74</sup> MANDELA, *supra* note 3, at 513–18.

<sup>75</sup> *Id.* at 517.

<sup>76</sup> *Id.* at 522–23.

wasted years. I am not less life-loving than you are. But I cannot sell my birthright, nor am I prepared to sell the birthright of the people to be free. I am in prison as the representative of the people and of your organisation, the African National Congress, which was banned.<sup>77</sup>

Even though this conditional offer was unambiguously rejected by Mandela,<sup>78</sup> it was accepted by a number of other prisoners serving long jail terms for sabotage.

The Nationalist Government continuously tempted Mandela to compromise the nation's interests to meet his personal interests, as recounted by George Bizos, his lifelong friend and personal lawyer. Bizos was one of the few people that had regular contact with Mandela when in prison. In an interview with Bizos after Mandela's release, the questioner noted that "Mandela, in the '80s, was submitted to what one might describe as a series of temptations, and one of them was the temptation of his freedom in exchange for abandoning the armed struggle."<sup>79</sup> George Bizos responded with:

. . . Yes. I think that the apartheid government believed its own propaganda almost right to the end, and it's the reason why they lost out. They believed that they could bribe Mandela in the manner in which they had bribed the bantustan leaders. What they were saying to him, "These exiles are led by the nose by the communists and by the Soviet Union. The people of South Africa would reject that. You have an existence independent of this organization. You come with us, and we will settle the matter, get some authority and we will give some sort of qualified rights to the majority of the people, and all will go well." They didn't know Mandela . . . This is why I think they gave him special facilities, at Pollsmoor and at Victor Verster prisons, and

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<sup>77</sup> *Id.*

<sup>78</sup> The backstory of this offer includes a vigorous effort by Kobe Coetsee, Botha's Minister of Justice, to persuade Botha to not make it. He was convinced Mandela would never accept it, and the rejection would make it difficult to fashion another way out without looking weak. He thought asking Mandela to renounce the armed struggle would be asking him to renounce his past, and given what Coetsee had learned about Mandela, he would not do this. Coetsee also considered the offer one-sided. The ANC would get nothing by sacrificing its strongest bargaining chip for Mandela's freedom. Coetsee wanted Botha to avoid offering Mandela a negative proposal to renounce violence and instead offer a positive one by asking Mandela to commit to a future peaceful process. See SPARKS, *supra* note 10, at 49–51.

<sup>79</sup> Interview by John Carlin with George Bizos, *The Long Walk of Nelson Mandela*, PBS, <http://www.pbs.org/wgbh/pages/frontline/shows/mandela/interviews/bizos.html> (last visited Apr. 10, 2016).



this is why they allowed him almost to run an office in the late '80s, where the warder and his son did the cooking, served the meal, the wine and gave him a telephone. That the house was locked but not to prevent Mandela from going out, but preventing people from coming in. And they thought that he would not have [been] able to resist this special treatment . . . . They still believed that they would be able to drive a wedge between Mandela and the others.<sup>80</sup>

In short, Nelson Mandela, as any skilled negotiator, understood his interests, knew his priorities, and advocated for them.

## 2. UNDERSTANDING OTHER SIDE'S INTERESTS

Mandela also had the remarkable capacity to understand the other side's interests, convince them he did, and find ways to meet their interests. By definition, a negotiation can succeed only if the other side agrees to the outcome. It is easy to be blinded to the other side's interests when occupied with advancing your own. This blind spot may not be fatal when trying to persuade a neutral third party judge, but it can be in a negotiation where the other side's consent is required.

Throughout the secret prison negotiations, as described in Appendix B, Mandela reassured the other side that he and the ANC wanted and needed the white minority to be part of the country's future. During the prison meetings, Mandela made a point that is often quoted when he stressed that, "[T]he majority would need the minority. We do not want to drive you to the sea."<sup>81</sup> In his letter to President Botha in anticipation of their first meeting, Mandela highlighted the interests of both sides that must be met when he recognized the need to address white South Africa's concerns about the impact of majority rule on them.<sup>82</sup> In his first meeting with President de Klerk, there was much discussion of ways to address each other's interests, including Mandela indicating why the Government's "group rights" proposal did not meet the Government's interests.<sup>83</sup> In response, President de Klerk said, "You know, . . . my aim is not different than yours. Your memo to P.W. Botha said the ANC and the Government should work together to deal with white fears of black domination . . . ."<sup>84</sup> In describing his first press conference the day after he was freed, Mandela said:

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<sup>80</sup> *Id.*

<sup>81</sup> MANDELA, *supra* note 3, at 539.

<sup>82</sup> *Id.* at 547.

<sup>83</sup> *Id.* at 555–56.

<sup>84</sup> *Id.* at 555.

[I] wanted to impress on the reporters the critical role of whites in any new dispensation. . . . We did not want to destroy the country before we freed it, and to drive the whites away would devastate the nation. I said that there was a middle ground between white fears and black hopes . . . “Whites are fellow South Africans,” I said, “and we want them to feel safe and to know that we appreciate the contribution that they have made toward the development of this country.” Any man or woman who abandons apartheid will be embraced in our struggle for a democratic, nonracial South Africa . . . .<sup>85</sup>

Mandela worked diligently to find ways to meet the interests of the white minority while not compromising his side’s interests. His efforts to meet their interests was facilitated by the relationships cultivated along his path toward freedom and statesman as described in the next section.

### 3. BUILDING RELATIONSHIPS AND FORWARD THINKING

Mandela built rapport and relationships with a clear eye on the future without becoming mired in past grievances and need for revenge. Mandela cultivated connections across the table even with the most hostile and resistant parties who were most threatened by his democratic agenda.<sup>86</sup> His natural ability to do this is legendary. His instinct to do so contributed greatly to his success in helping negotiate a democratic future for South Africa.

Many of us marvel at Mandela’s ability to treat his oppressors with respect and negotiate directly with them. In mediation parlance, he negotiated in joint sessions, a format subject to much debate.<sup>87</sup> A significant number of attorneys and mediators prefer keeping parties separate because they think parties in conflict are too angry with each other to work productively in the same room. And, Mandela had good reason to be angry. He had been sentenced to life in prison, confined for eighteen years in a tiny cell on Robben Island where he lived in unbearably harsh conditions, separated from his wife, children, and friends for twenty-seven years, and more. Mandela’s ability to move past all that and focus on the future was essential to his success.<sup>88</sup> Focusing on the

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<sup>85</sup> *Id.* at 568–69.

<sup>86</sup> MNOOKIN, *supra* note 2, at 135–36.

<sup>87</sup> See ABRAMSON, *supra* note 11, at ch. 5.4.

<sup>88</sup> During the ten days of mourning, we heard testimonials at the various memorial services that if Mandela could move forward given what he suffered under apartheid, so could they. I was much affected by an exchange with the nineteen-year-old son of a long-time friend in South Africa. He identified himself as a member of the “born free”

future can be necessary for resolving many sorts of disputes, as any experienced negotiator and mediator know.

*How could Mandela negotiate directly with his oppressors?*

Mandela's view of the "enemy" helped him work with individuals who had engaged in horrific and immoral deeds or were part of system that did so. He viewed the enemy as the system that turned everyone against each other, and it was that system that he hated. He concluded that, "[T]he liberation struggle was not a battle against any one group or colour, but a fight against a system of repression."<sup>89</sup> "I wanted South Africa to see that I loved even my enemies while I hated the system that turned us against one another."<sup>90</sup>

He also believed in the humanity of people. He thought that, "[N]o one is born hating another person because of the colour of his skin . . . People must learn to hate, and if they can learn to hate, they can be taught to love . . ."<sup>91</sup>

### *a. Reaching out to Both Sides of the Table*

In his Cape Town remarks, he reached out to build relationships with people on his side of the table as well as across the table.<sup>92</sup> Mandela had a large number of people on both sides to attend to and he did.

In his first speech as a free man, he had to reestablish the confidence of the people on his side of the table.<sup>93</sup> Mandela had to secure credibility with the ANC leadership and the larger body politic including blacks, coloreds, Indians, and sympathetic whites.<sup>94</sup> He had to demonstrate that the twenty-

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generation. Reflecting on Mandela's sacrifices, this young man was in awe that Mandela spent more years in prisons than he had yet spent on this earth and was still able to move forward.

<sup>89</sup> MANDELA, *supra* note 3, at 620.

<sup>90</sup> *Id.* at 568.

<sup>91</sup> WALDMEIR, *supra* note 9, at 88.

<sup>92</sup> Professor Mnookin noted that it takes great skill for a negotiator to manage the tension between "what is going on *across the table* with your adversary and what is happening *behind the table* among your constituents." MNOOKIN, *supra* note 2, at 133-34 (emphasis added). Behind the table, any negotiator may need to work with a client, spouse, supervisor, members of a board of directors, a constituency, the public, and so on.

<sup>93</sup> MANDELA, *supra* note 3, at 566-67.

<sup>94</sup> "Colored" or "Coloured" is a term used in South Africa to identify people of mixed races. The label is not inherently derogatory as when used outside of South Africa. See, e.g., Eusebius McKaiser, *Not White Enough, Not Black Enough*, N.Y. TIMES: LATITUDE

seven years in prison did not break him—that he did not sell out. He thanked a long list of specific people and groups and unqualifiedly reaffirmed his membership and agreement with the objectives, strategies, and tactics of the ANC.

He also reached across the table and praised President de Klerk, who headed the government responsible for his decades of confinement. Mandela said:

Mr. [d]e Klerk has gone further than any other Nationalist president in taking real steps to normalise the situation . . . . It must be added that Mr. de Klerk himself is a man of integrity who is acutely aware of the dangers of a public figure not honouring his undertakings.<sup>95</sup>

When praising de Klerk, Mandela put at risk his fragile relationship with people on his side of the table. Yet, he chose to elevate de Klerk as a credible negotiating partner and send a reassuring message to the fearful white minority, whose support he would need.<sup>96</sup>

#### *b. Meeting with the Presidents*

In prison, Mandela asked to meet with President Botha and later President de Klerk. Mandela's recollections of those meetings remind us of the benefit of meeting directly with the other side. Personal interactions can open up opportunities for relationship building that may facilitate future hard bargaining.

Mandela recalled how tense he felt about meeting with Mr. Botha. He was known as the Great Crocodile, and Mandela had heard many accounts of Botha's ferocious temper.<sup>97</sup> Mandela resolved that if Botha acted in "that finger-wagging fashion" with him, Mandela would stand up and adjourn the meeting (an unusual option for a prisoner).<sup>98</sup> After the meeting, Mandela said,

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BLOG (Feb. 15, 2012, 8:38 AM), [http://latitude.blogs.nytimes.com/2012/02/15/in-south-africa-after-apartheid-colored-community-is-the-big-loser/?\\_r=0](http://latitude.blogs.nytimes.com/2012/02/15/in-south-africa-after-apartheid-colored-community-is-the-big-loser/?_r=0).

<sup>95</sup> O'Malley, *supra* note 5.

<sup>96</sup> Unfortunately, President de Klerk thought Mandela did not succeed across the table because he called for continuing the armed struggle and sanctions. In his autobiography, de Klerk thought that, "[h]is message, which [had] evidently been drafted by hardline ideologues within the ANC alliance, brought us little comfort or reason to share in the general rejoicing. For once, Mandela failed completely to rise to the occasion." DE KLERK, *supra* note 10, at 169–70.

<sup>97</sup> MANDELA, *supra* note 3, at 549.

<sup>98</sup> *Id.* at 550.

“[H]e completely disarmed me. He was unfailingly courteous, deferential, and friendly.”<sup>99</sup>

At the end of his first meeting with de Klerk, Mandela concluded, “I was able to write to our people . . . that Mr. de Klerk seemed to represent a true departure from the National Party politicians of the past. Mr. de Klerk . . . was a man we could do business with.”<sup>100</sup> For seven years after his release, he had to negotiate with de Klerk as President and then as his Deputy President.

*c. Secret Negotiations in Prison*

Unbeknownst to the rest of the world, Mandela negotiated with the Nationalist Government while in prison. A special committee was formed that included Mandela and four senior and powerful representatives of the Government. They held the power to improve or degrade the quality of Mandela’s prison life as well as to release him.

The secret committee, that met forty-seven times beginning in 1987,<sup>101</sup> included:<sup>102</sup>

1. Kobie Coetsee, who was the Minister of Justice and served as Chair. He extended the first olive branch from the Government to Mandela in 1985 when he made a surprise visit to Mandela in the hospital. Before the committee convened, he spent time getting a sense of Mandela by reading internal reports and meeting with people who knew him well including George Bizos, Mandela’s personal attorney, and Winnie Mandela. In early 1986, he escorted Mandela during the “eminent persons” visits where he observed Mandela greet and interact with several dignitaries from abroad and concluded that he “could be the man.”<sup>103</sup>

2. General Willemse, who was the Commissioner of Prisoners.

3. Fanie van der Merwe, who was the Director General of the Prisons Department.

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<sup>99</sup> *Id.* at 549–50.

<sup>100</sup> *Id.* at 556.

<sup>101</sup> MNOOKIN, *supra* note 2, at 122.

<sup>102</sup> The information concerning the secret committee can be found in MANDELA, *supra* note 3, at 533–34.

<sup>103</sup> SPARKS, *supra* note 10, at 15–20, 28–36.

4. Dr. Niel Barnard, who was head of the National Intelligence Service (NIS), the agency that collected intelligence on the activities of ANC and sympathizers. To the ANC, he was “viewed as evil incarnate.”<sup>104</sup> He also was a key member of the inner circle known as the State Security Council and protégé of President P. W. Botha. Mandela was most disturbed by Barnard’s participation but decided not to object because Mandela did not want to alienate Botha.

In these meetings, they discussed key issues familiar to everyone, although each person’s view had been shaped by his partisan bias.<sup>105</sup> What made these discussions new was that Mandela and the other side could discuss these issues directly with each other. As Mandela observed, when he began the meetings he realized that, “[T]hey were the victims of so much propaganda that it was necessary to straighten them out about certain facts . . . I spent some time in the beginning sketching out the history of the ANC and then explaining our positions on the primary issues that divided [both sides].”<sup>106</sup>

Three of the Government representatives significantly contributed to the ultimate transition to majority rule. Kobie Coetsee engaged in increasingly important roles in facilitating Mandela’s release, supporting his role as leader of the ANC, and advising Presidents Botha and de Klerk on how to work positively with Mandela. After Mandela’s release, Coetsee became one of the key negotiators for the Nationalist Government and was elected President of the Senate in the post-apartheid legislature.<sup>107</sup> Dr. Niel Barnard progressively became more deeply involved in preparing Mandela for his release including facilitating the meeting with Botha. He also helped fashion a post-apartheid South Africa.<sup>108</sup> Barnard continued as head of NIS from 1979–1992, and then became Director General of Department of Constitutional Development. Fanie van der Merwe became an early and passionate convert to majority rule and De Klerk’s chief constitutional advisor.<sup>109</sup>

Mandela’s facility to use these opportunities and others to forge relationships with people across the table helped build support for and trust in Mandela to lead South Africa into a post-apartheid world. Professor Mnookin concluded that,

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<sup>104</sup> MNOOKIN, *supra* note 2, at 123.

<sup>105</sup> See *infra* App. B (providing a detailed negotiation analysis of these meetings).

<sup>106</sup> MANDELA, *supra* note 3, at 537.

<sup>107</sup> See WALDMEIR, *supra* note 9, at 100–02.

<sup>108</sup> See *id.*

<sup>109</sup> *Id.*

Mandela was a negotiator to whom one could make concessions and yet maintain one's self-respect. Mandela worked hard to establish and maintain a personal, human connection with Afrikaner leaders whose life experiences and attitudes were radically different from his own . . . Waldmeir [in her book on the negotiations] concludes . . . They learned to trust him with their fate.<sup>110</sup>

#### 4. LISTENING

We know that one of the greatest challenges for lawyers who are occupied with advocating is to also listen, although any student of negotiations knows how vital listening skills are.<sup>111</sup> President de Klerk recognized Mandela's skills after the first day of post-release negotiations. He concluded, "My first impressions of Nelson Mandela were confirmed during this extended meeting. He was a good listener . . ."<sup>112</sup>

#### 5. APOLOGIZING

This negotiation study uncovered an apology three months after Mandela's release when the formal post-apartheid negotiations were commencing. Even though this study is limited until the day of his release, this post-release event is mentioned because of how frequently the value of apologies is dismissed. This example illustrates the benefits.

Mandela recorded that President de Klerk "suggested that the system of separate development had been conceived as a benign idea, but had not worked in practice. For that, he said, he was sorry, and hoped the negotiations would make amends."<sup>113</sup>

The benefits of sincere apologies in negotiation and mediations have been the subject of multiple studies. They have focused on how to deliver an effective apology, including assessing the impact of full and partial apologies.<sup>114</sup>

In a full apology, the apologizer accepts complete and unconditional responsibility for what the person did. In a partial apology, the apologizer limits his responsibility by justifying what he did.<sup>115</sup>

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<sup>110</sup> MNOOKIN, *supra* note 2, at 136. See also WALDMEIR, *supra* note 9, at 102.

<sup>111</sup> See ABRAMSON, *supra* note 11, at App. F.

<sup>112</sup> DE KLERK, *supra* note 10, at 181.

<sup>113</sup> MANDELA, *supra* note 3, at 579.

<sup>114</sup> See ABRAMSON, *supra* note 11, at 396–401 (providing a summary of the literature on apologies).

<sup>115</sup> See *id.*

De Klerk offered an apology with an explanation, which makes it a partial one. He did not take full responsibility for what happened; he apologized for an idea that did not work out as planned. A partial apology poses risks and can be worse than no apology when responsibility for what happened is clear or the injury is severe. It risks exacerbating the conflict because the recipient can resent the failure of the apologizer to take full responsibility.

Given Mandela's view that the Nationalist Government was responsible for substantial harm, the Government's partial apology could have provoked an antagonistic beginning for the meetings. However, Mandela reacted positively at the time, "It was not an apology for apartheid, but it went further than any other National Party leader ever had."<sup>116</sup>

This risky partial apology might have been well received by Mandela because he understood the historical significance of the statement and could focus on the future. It was the first formal acknowledgment by the Nationalist Government that apartheid was ill conceived, and it was offered at the beginning of the formal negotiations, which presented an opportunity to fulfill any commitment to "make amends."<sup>117</sup>

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<sup>116</sup> MANDELA, *supra* note 3, at 579. President de Klerk never did apologize for the idea of apartheid, only for how it was implemented. South African journalist Allister Sparks, in his book on the negotiation process, indicated that, "De Klerk still will not apologize for apartheid, which he dismisses as simply a political mistake that had to be rectified. It began, he insists, as 'an honourable vision of justice'—one that would allow separate development for white South Africans and the various black tribal groups. Only when it proved to be unworkable did it become unjust, he says, 'and when we realized that we changed it.'" *Id.* at 91–92.

<sup>117</sup> At the time of this apology, it was probably unlikely a full apology would be offered because of the political risks to de Klerk's governing party that relied on conservative white voters who were resisting change. Also, a full apology might have undermined the party's legitimacy to stay in power and provided a basis for the victims to seek reparations that the financially-strapped government could not afford. See Christopher Wren, *The World; South Africa and Apartheid: No Apologies*, N.Y. TIMES (Feb. 24, 1991), <http://www.nytimes.com/1991/02/24/weekinreview/the-world-south-africa-and-apartheid-no-apologies.html>. Several years later, when former President de Klerk submitted his official submission to the Truth and Reconciliation Commission, he put the apartheid policies of the Nationalist party in a historical context and concluded with another partial apology: "I and many other leading figures, have already publicly apologized for the pain and suffering caused by former policies of the National Party. . . . I reiterate those apologies today." Padraig O'Malley, *Submission to The Truth And Reconciliation Commission By Mr. F.W. de Klerk, Leader of the National Party*, NELSON MANDELA FOUND., <https://www.nelsonmandela.org/omalley/index.php/site/q/03lv02167/04lv02264/05lv02303/06lv02331/07lv02332.htm> (last visited Apr. 10, 2016). In a 2012 CNN interview (twenty-two years after Mandela's release), de Klerk gave another partial apology when he said, "I have made the most profound apology in front of the Truth Commission and on



These various examples of good practices by Mandela in this section are outstanding illustrations of an effective negotiation style. In the next two sections, I consider whether Mandela used tactics and tricks.

### B. *Misrepresentation—Good Practice, Tactic, or Trick?*

In his Cape Town speech, Mandela misrepresented to the people on his side of the table that:

Today, I wish to report to you that my talks with the Government have been aimed at normalizing the political situation in the country. We have *not as yet begun discussing the basic demands of the struggle*. I wish to stress that *I myself had at no time entered into negotiations about the future of our country*, except to insist on a meeting between the ANC and the Government.<sup>118</sup>

Based on Mandela's own description of what transpired in those prison meetings, it is evident that he discussed the "basic demands of the struggle" and "entered into negotiations about the future of [the] country."<sup>119</sup> He participated in multiple meetings, including ones with Presidents Botha and de Klerk where he discussed in detail the four basic issues dividing the ANC and Government.<sup>120</sup>

He might have been able to contend technically that he never "entered into negotiations" because he never agreed to anything or endorsed any compromises. However, I doubt these lawyerly distinctions would have been persuasive to the public.

Furthermore, when Mandela initially reached out to the Government and agreed to meet with the special government committee while in prison, he

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other occasions about the injustices wrought by apartheid." He also stated, "What I haven't apologized for is the original concept of seeking to bring justice to all South Africans through the concept of nation states (essentially creating two states, one black and one white). But in South Africa it failed. And by the end of the '70's, we had to realize, and accept and admit to ourselves that it had failed." Lucky Gold, *De Klerk: 'No Animosity' with Mandela*, CNN AMANPOUR BLOG (May 10, 2012, 9:13 PM), <http://amanpour.blogs.cnn.com/2012/05/10/de-klerk-no-animosity-with-mandela/>. When asked if apartheid failed because it was unworkable or morally repugnant, he offered three reasons why apartheid turned out to be unworkable. He did not condemn a policy of apartheid as morally repugnant. *Id.*

<sup>118</sup> O'Malley, *supra* note 5 (emphasis added).

<sup>119</sup> *Id.*

<sup>120</sup> See *infra* App. B.

avoided telling his colleagues in prison what he had already done when inquiring whether he should initiate negotiations. Mandela said, "I chose to tell no one of what I was about to do."<sup>121</sup> Mnookin euphemistically described Mandela as "shading the truth" and as resolving "the quandary in the usual way, with partial (and misleading) disclosures to his ANC prison mates."<sup>122</sup>

Two weeks after his speech, Mandela met with the ANC leadership and candidly disclosed for the first time the nature of the secret talks with the Government. In Mandela's own words: "I described the demands I had made, and the progress that had been achieved."<sup>123</sup> When making these disclosures, Mandela knew he had to prove he had not sold out the ANC while in prison. ANC members had heard reports of Mandela's private conversations with the Government, were aware of his prison upgrades, and were concerned that Mandela had been out of touch with what was happening on the ground since 1964. This disclosure was a critical one for Mandela as a negotiator who wanted to establish the trust of the people on his side of the table after being absent for so long. Apparently he was successful. At the meeting, they elected him deputy president of the ANC.<sup>124</sup>

Was this misrepresentation a negotiation trick? Misrepresentations are typically a hallmark of a trick, with high risks of harm if discovered. Even though he made a false statement, I do not think this negotiating behavior was a trick. Mandela unilaterally concluded that the misstatement could be justified because the secret meetings were for the benefit of the ANC and its members. He said that,

I knew my colleagues . . . would condemn my proposal [to meet with government representatives], and that would kill my initiative even before it was born. There are times when a leader must move out ahead of his flock, go off in a new direction, confident that he is leading his people the right way.<sup>125</sup>

If the negotiating behavior can be justified, can it be classified as a good practice? I do not think so because it risked undermining trust in Mandela and the negotiation process he had been participating in. The misrepresentation revealed that Mandela was capable of being deceitful when he thought it could be justified. A good practice is to reliably tell the truth. Good practices like effective listening, being ethical, advocating for interests, and so forth rarely need to be justified to others.

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<sup>121</sup> MANDELA, *supra* note 3, at 526.

<sup>122</sup> MNOOKIN, *supra* note 2, at 122–23.

<sup>123</sup> MANDELA, *supra* note 3, at 571–72.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 526. *See id.* at 525–26, 534–36.

Was this misstatement a “tactic” that could be viewed as generally accepted behavior with moderate risks if discovered? Misrepresentations that are “generally accepted conventions in negotiations” are exempted under the Model Rules of Professional Conduct of the American Bar Association, for instance. The Rules treat as non-material misrepresentations “estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim.”<sup>126</sup> Mandela’s particular misstatement would not qualify for an ABA-type exemption, of course.

This misrepresentation was a misstatement of objective fact that could be considered material. Material misrepresentations are typically viewed as tricks. A material fact is one that the listener will likely attach importance to and influence the listener’s choice or decision.<sup>127</sup> Mandela had reason to believe that his supporters would regard this statement as important when determining their choice to support him at the Cape Town celebration of his release. The misstatement reassured people on Mandela’s side of the table that he did not make any concessions in private negotiations on behalf of the freedom struggle.

If he had made an accurate representation that the secret negotiations were substantive and that he made no concessions, the statement might have generated suspicions that Mandela was not being honest without knowing more. They might have wondered whether he had discussed the issues most important to them or made concessions that were inadequately vetted. A brief, accurate representation might have risked hurting the liberation struggle on Mandela’s first day of freedom when confidence in his leadership was so vital for moving toward.

One way for a negotiator to test whether his move is a tactic or trick is to inquire how he would react if someone made the misrepresentation to him. Presumably Mandela considered this perspective when choosing to make this misstatement and deferring disclosure until he had an opportunity to explain the benefits to the ANC leadership. By the ANC leadership reaffirming their confidence in him when electing him to a leadership position, the ANC

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<sup>126</sup> MODEL RULES OF PROF’L CONDUCT r. 4.1 cmt. at 2 (AM. BAR ASS’N 1983).

<sup>127</sup> “A statement is material for the purposes of Rule 4.1(a) if it could have influenced the hearer.” ANNOT. MODEL RULES OF PROF’L CONDUCT 385 (AM. BAR ASS’N 2007). Information is also considered material if it “would or could have influenced the decision-making process significantly.” *In re Merkel*, 138 P.3d 847, 850 (Or. 2006). The Restatement (Second) of Torts § 538 provides that a “matter is material if a reasonable man would attach importance to . . . [it] in determining his choice of action,” or the speaker “knows . . . that the recipient [party] regards . . . the matter as important in determining his choice of action.” RESTATEMENT (SECOND) OF TORTS § 538 (1977).

apparently viewed the material misrepresentation as acceptable or tolerable and therefore as a tactic.

C. “*Prepared to Die*”—*Good Practice or Tactic?*

Mandela’s concluding remarks at the Rivonia Trial illustrated the difference between good practices and tactics. Mandela gave his often-cited “I am prepared to die” remarks when he and the other defendants were being tried for treason.<sup>128</sup> Mandela was not only facing the death sentence, he was convinced it would be imposed.<sup>129</sup> At the end of his four-hour presentation justifying why he joined the struggle, he gave his famous remarks that he also quoted in his Cape Town speech.

His concluding remarks were:

During my lifetime I have dedicated myself to this struggle of the African people. I have fought against white domination, and I have fought against black domination. I have cherished the ideal of a democratic and free society in which all persons will live together in harmony and with equal opportunities. It is an ideal for which I hope to live for and to achieve. But, if needs be, it is an ideal for which I am prepared to die.<sup>130</sup>

In the 1964 Rivonia Trial, the claim was probably a good practice. He wanted to convince people that he was so committed to achieving democratic ideals that he was prepared to be a martyr. In any negotiations, a party not only should clearly express his priorities; a party needs to convince the other side that the priorities are his real ones in order to be taken seriously.

When Mandela repeated the quote on the day of his prison release, the same claim was probably a tactic. He wanted to persuade others that he was as committed to his goals that day as he was more than twenty-seven years earlier. This time, the claim was probably puffery—a conventional practice of

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<sup>128</sup> MANDELA, *supra* note 3, at 368.

<sup>129</sup> *Id.*

<sup>130</sup> Mandela, *supra* note 67. Mandela’s attorney, George Bizos, was concerned that the statement might invite the death sentence and objected to it. They arrived at a compromise where Mandela agreed to add the phrase “if needs be.” Interview by John Carlin with George Bizos, *supra* note 79. He convinced Mandela to add these additional words at the last minute in order to moderate his language. See Rebecca Lowe, *Friend, Client, Confidant: George Bizos on 65 years of friendship with Nelson Mandela*, INT’L BAR ASS’N (Dec. 12, 2013), <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=515d7b65-e271-4d56-82af-743491dd2ba0>.

exaggerating claims to make a point. I doubt that Mandela or anyone believed Mandela wanted to be a martyr at this juncture. He employed a rhetorical phrase to demonstrate that he was still dedicated to the cause of democracy.

#### D. *Win-Win Resolution?*

President de Klerk stunned the country and the world on February 2, 1990, when he gave his momentous unbanning speech.<sup>131</sup> He announced at the opening session of Parliament that the Government would meet key preconditions for negotiations set by Mandela and the ANC. President de Klerk unilaterally rescinded the ban against ANC and other organizations, released political prisoners, and made other moves designed to “normalise the political process.”<sup>132</sup> He laid the groundwork for a new constitution under which every person “will enjoy equal rights, treatment and opportunity in every sphere of endeavour—constitutional, social, and economic.”<sup>133</sup> He announced that, “The agenda is open . . . . Among other things, those aims include a new, democratic constitution; universal franchise; no domination; equality before an independent judiciary; the protection of minorities as well as of individual rights . . . .”<sup>134</sup>

He gave particular attention to stopping the violence—a key feature of the Government’s negative BATNA. He stated that he was moving “away from measures which have been seized upon as a justification for confrontation and violence.”<sup>135</sup> “Our country and all its people have been embroiled in conflict, tension and violent struggle for decades. It is time to break out of the cycle of violence and break through to peace and reconciliation.”<sup>136</sup> He went on to say that, “Without conceding that violence has ever been justified . . . [t]he justification for violence which was always advanced, no longer exists. . . . [T]here is no longer any reasonable excuse for the continuation of violence.”<sup>137</sup> He also addressed sanctions, another key component of the Government’s negative BATNA, when he called on “the international community to re-

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<sup>131</sup> *Organisations Unbanned*, *supra* note 13.

<sup>132</sup> Padraig O’Malley, *F.W. de Klerk’s Speech at the Opening of Parliament 2 February 1990*, NELSON MANDELA FOUND., <http://www.nelsonmandela.org/omalley/index.php/site/q/03lv02039/04lv02103/05lv02104/06lv02105.htm> (last visited Apr. 10, 2016).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

evaluate its position and to adopt a positive attitude towards the dynamic evolution which is taking place in South Africa.”<sup>138</sup>

And he made the announcement that everyone was waiting for but on terms not anticipated. He declared that, “I wish to put it plainly that the Government has taken a firm decision to release Mr. Mandela unconditionally.”<sup>139</sup>

### *Analysis of Resolution*

Mandela achieved an impressive negotiated outcome when you consider that Mandela prevailed on each distributive issue: he was unconditionally released without renouncing violence, the ANC and other organizations were unbanned, and de Klerk announced an agenda for forming a post-apartheid government. Mandela did not make a single concession in the secret negotiations.

Mandela reached this result in the face of temptations to compromise and make concessions. Mandela’s appetite for liberty was strategically whetted beginning in 1982 when he was transferred out of Robben Island. He was exposed to snippets of life outside of prison including an improving standard of living, road trips, physical contact with family members, and social and professional interactions with friends and colleagues. He nevertheless negotiated with an unwavering eye on his primary interest—the liberation of his country over his personal liberation.

Is this a case study where only one side’s interests were met? Did Mandela win?<sup>140</sup> Did de Klerk capitulate and the Nationalist Government receive nothing? It might appear so. Mandela did have a strong bargaining position by 1990 because he had become an internationally revered leader in prison while the Nationalist Government had an unbearable BATNA.

A closer examination of the results suggests that this outcome met significant interests of the Government (and the white minority it represented).

First, the resolution opened the door toward political and economic stability including the Government rejoining regional and global communities of public and economic affairs. The country had become ungovernable, and apartheid policies had made South Africa an international pariah. A dramatic

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<sup>138</sup> *Id.*

<sup>139</sup> See *id.* One week later, de Klerk met with Mandela to inform him that he would be released the next day—unconditionally. Mandela walked out of prison with Winnie by his side and went to Cape Town City Hall to give his first speech as a free man. MANDELA, *supra* note 3, at 557–58.

<sup>140</sup> SAMPSON, *supra* note 9, at 396. Sampson concluded that after the unbanning “Mandela had won.” *Id.*

move of liberalization would likely win necessary diplomatic support from conservative administrations in London and Washington, D.C.

President de Klerk opened the door by making two essential commitments: the unsurprising decision to release Mandela and the sensational commitment to dismantle apartheid and move toward a new form of democratic government.

While de Klerk's commitment to release Mandela was specific and unconditional, his commitment to dismantling apartheid was only in principle. He did not commit to any details, which he left open for later negotiations.

He laid out the government's lofty and broad guidelines for the future while emphasizing that he was refraining from discussing the merits of numerous political questions that would soon be debated and subject to multilateral negotiations. He put on the agenda an analysis of various models of democratic constitutions without committing to a particular model. He put on the agenda the issues of "no domination" and the need to protect individual and minority rights—code terms for protecting the white minority. He put on the "open" agenda an aim for "universal franchise," a more ambiguous term than "majority rule" demanded by Mandela. Universal franchise is associated with a right to vote regardless of race and gender, although the term left unclear what the vote would be for and whether white and black voters would be treated as equals.

At the time of the speech, de Klerk privately planned to "share power with blacks, subject to an effective white veto, not to hand it over."<sup>141</sup> After the speech, he persisted in trying to fashion a power-sharing scheme based on groups' rights in the new Constitution. He had no intention of "negotiating the National Party out of power."<sup>142</sup>

In his autobiography, de Klerk made clear what he wanted to achieve with the announcement:

We had prepared a comprehensive media strategy to ensure the speech received maximum favourable publicity . . . . We had succeeded in catching the media, the political opposition and the world completely by surprise . . . . We had achieved our objective of convincing our friends and foes alike that the National Party had made a paradigm

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<sup>141</sup> WALDMEIR, *supra* note 9, at 149. See *id.* at 111–13, 149–51. The majority rule proposal was subject to considerable debate, compromise, and trading for other benefits for the white minority before it was ultimately adopted in the new South African Constitution. *Id.*

<sup>142</sup> LODGE, *supra* note 9, at 169. In the weeks after Mandela's release, de Klerk proposed a bicameral legislature designed to ensure the minority Nationalist party significant power in the new government. *Id.*

shift . . . . Within the scope of eight days [the date of the speech and the later announcement that Mandela would be released the next day], we had succeeded in dramatically changing global perceptions of South Africa.”<sup>143</sup>

Second, the announcement gave the Government what it perceived as the moral high ground by calling to halt the violence including removing any excuses for engaging in violence. You will recall that Mandela had rejected earlier calls for suspending the armed struggle.

Third, the announcement gave the Government a negotiating partner, Nelson Mandela. The Nationalist Government needed a black leader that it could work with and who might be able to lead the black majority while decreasing the likelihood of a civil war. As far back as 1981 when Kobie Coetsee became Minister of Justice, an internal background report he requested described Mandela as a “practical and pragmatic thinker” with “capacity for integrated and creative thought” who “maintains outstanding personal relations . . . and always behaves in a friendly and respectful way towards figures of authority.”<sup>144</sup> It concluded that: “There exists no doubt that Mandela commands all the qualities to be the Number One black leader in South Africa.”<sup>145</sup> This assessment was corroborated by the relationships and trust that Mandela developed with members of the secret committee during the forty-seven meetings. The accounts of those meetings showed how Mandela “tried to establish a ‘personal link’ with each member of the committee.”<sup>146</sup> The accounts also revealed that the Government representatives learned much about how Mandela approached key substantive issues that divided them including his understanding of the need to engage the white minority in any post-apartheid South Africa. After de Klerk’s first meeting with Mandela, de Klerk noted that he “took his [Mandela’s] measure while he spoke. I think we both reached more or less the same conclusion: that it would be possible for us to do business with each other.”<sup>147</sup>

The Government helped prepare Mandela for this daunting leadership role by acclimating and educating Mandela about the world he would be re-joining

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<sup>143</sup> DE KLERK, *supra* note 10, at 158.

<sup>144</sup> SAMPSON, *supra* note 9, at 295.

<sup>145</sup> *Id.*

<sup>146</sup> MNOOKIN, *supra* note 2, at 123–25. See WALDMEIR, *supra* note 9, at 101–02 (describing the positive relationship Mandela developed with the conservative head of security, Barnard, who Mandela did not want to be part of the secret committee because of Barnard’s role in monitoring the activities of the ANC).

<sup>147</sup> DE KLERK, *supra* note 10, at 158.



when the Government upgraded his prison facilities, gave him access to mass media and people, and took him on field trips.

The appropriate choice of Mandela has not only been proven by history, it has been validated by Mandela's own description of the importance of his relationship with de Klerk. When commenting on receiving jointly the 1993 Nobel Peace Prize, he said, "To make peace with an enemy one must work with that enemy, and that enemy becomes one's partner."<sup>148</sup> Mandela confessed to friends, "My worst nightmare is that I wake up one night and that de Klerk isn't there. I need him. Whether I like him or not is irrelevant, I need him."<sup>149</sup>

This "deal" like any negotiated resolution met the interests of both sides sufficiently for it to be done, although without a formal signing of an agreement. As illustrated throughout this article, Mandela achieved this result by relying primarily on good negotiation practices.

#### *Postscript: 1990–1994*

This study focused on Mandela as the chief negotiator when in prison although many other people were also participating in the negotiations on Mandela's side of the table. After Mandela's release and the negotiations became public, arduous and agonizing negotiations still laid ahead. The next stage began as more people came to both sides of the table and the parties moved from broad principles to the details of how a post-apartheid democratic government would be fashioned and function. The bitter and complex negotiations proceeded in a brutal environment of violent and deadly conflicts between whites and blacks as well as between different black political factions. The negotiations took place across the table as well as behind the table with deep divisions of how to proceed among whites and among blacks. It ended after the elections on May 2, 1994, when Mr. de Klerk made his concession speech and May 10, when Nelson Mandela was sworn in as the new, democratically elected President of South Africa, with de Klerk as his Deputy President.<sup>150</sup>

#### IV. CONCLUSION

Nelson Mandela illustrated the use of good negotiation practices in this exceptional negotiation from 1985–1990 over the decision to dismantle

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<sup>148</sup> MANDELA, *supra* note 3, at 612.

<sup>149</sup> MNOOKIN, *supra* note 2, at 136. See WALDMEIR, *supra* note 9, at 231.

<sup>150</sup> MANDELA, *supra* note 3, at Part 11; SPARKS, *supra* note 10, at chs. 10–15; DE KLERK, *supra* note 10, at chs. 16–35; MNOOKIN, *supra* note 2, at 127–33.

apartheid and free him. So what did Mandela teach us new about how to negotiate? Nothing. He did what any good negotiator should do.

Mandela followed a textbook approach, although it is unlikely that he read any of the classics in negotiation like *Getting to Yes*. Mandela uncompromisingly advocated interests, convincingly addressed the other side's interests, helped shape an unattractive alternative to negotiations for the Nationalist Government, and consistently engaged in good negotiation practices with some tactics. And, the negotiation produced a result that significantly met both sides' interests when he was released.

Mandela and de Klerk, for their negotiation achievements including after 1990, were awarded the Nobel Peace Prize "for their work for the peaceful termination of the apartheid regime, and for the laying the foundations for a new democratic South Africa."<sup>151</sup>

At the main international memorial service for Mandela, President Obama delivered a stirring speech that highlighted practices of Mandela's that are commonly associated with good negotiating.<sup>152</sup> Obama said that Mandela

taught us the power of action, but . . . also . . . ideas; the importance of reason and arguments; the need to study not only those you agree with, but those who don't . . . Mandela understood the ties that bind the human spirit. There is a word in South Africa—Ubuntu—a word that captures [his] greatest gift: his recognition that we are all bound together . . . .<sup>153</sup>

Professor Robert Mnookin when labeling Mandela as the "greatest negotiator of the twentieth century" concluded that, "Mandela understood that the goal of negotiation is to persuade your adversaries. He ultimately achieved through negotiation an outcome that could never have been accomplished solely

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<sup>151</sup> MANDELA, *supra* note 3, at 611–12. The award surprised Mandela, who thought he would be disqualified for embracing armed struggle for over thirty years, starting with the founding of Umkhonto we Sizwe (MK). *Id.*

<sup>152</sup> President Obama spoke at the main international memorial service in the First National Bank Stadium in Johannesburg. We were in Cape Town giving a training program and gathered with others to watch the televised ceremony celebrating Mandela's inspiring life, while looking out the window at Robben Island where Mandela spent eighteen of those years confined to a tiny cell.

<sup>153</sup> President Barack Obama, Remarks at the Memorial Service for Former South African President Nelson Mandela (Dec. 10, 2013), in WHITE HOUSE OFFICE OF THE PRESS SECRETARY, <https://www.whitehouse.gov/the-press-office/2013/12/10/remarks-president-obama-memorial-service-former-south-african-president->.

## NELSON MANDELA AS NEGOTIATOR

through violence or resistance. Moreover, he did this without making any concessions with respect to his core political beliefs.”<sup>154</sup>

Can we learn anything from Nelson Mandela as a negotiator? Yes. His negotiation story offers compelling evidence for anyone who is not persuaded that these negotiation practices are effective. If Mandela could use these techniques successfully when facing the complex, heated, and intractable distributive conflicts in South Africa, lawyers and people in conflict should confidently use them when resolving routine disputes.<sup>155</sup>

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<sup>154</sup> MNOOKIN, *supra* note 2, at 135.

<sup>155</sup> ABRAMSON, *supra* note 11, at 5–6. These techniques are part of a problem-solving approach to negotiations. In problem-solving, negotiators advocate for interests over positions, look for solutions that go beyond traditional ones based on rights, obligations, and precedent, and engage in a range of good practices over tricks including resolving distributive features using non-adversarial (without tricks) techniques suitable for problem-solving.

## APPENDIX A: NEGATIVE BATNA FOR THE NATIONALIST GOVERNMENT

These events and people helped induce the Government to come to the negotiating table by making no agreement unattractive and unacceptable. They did much to shape the Government's negative BATNA (Best Alternative to a Negotiated Agreement).

*Events*

-1960. *Sharpeville Massacre* brought global attention to the conditions under apartheid when the police killed sixty-nine protestors within two minutes—most of whom were shot in the back as they were fleeing—and wounded another four hundred people. Several thousand protestors, as part of a massive anti-pass campaign, had showed up at a local police station without their passes and a riot broke out. After the Sharpeville Massacre, the ANC organized a nationwide protest strike that included the public burning of passbooks by Mandela and many leaders. The government declared a state of emergency, suspended habeas corpus and banned the ANC. The landscape for fighting apartheid changed in one day as both the intensity of protests and the responses by the Nationalist Government escalated in full view of the world.<sup>156</sup>

-1961. *Umkonto We Sizwe* (Spear of the Nation) (MK), a military wing of the ANC was organized in the wake of the Sharpeville Massacre to engage in armed struggle and endured for the next thirty years. Mandela's early leadership in MK contributed to his life imprisonment conviction. He continued to endorse the work of MK until almost six months after his release.<sup>157</sup>

-1962–1964. The *Rivonia Trial* brought further international attention to the oppressive apartheid conditions. The Nationalist Government charged Mandela and other ANC leaders with sabotage, violent revolution, and conspiracy with others, including foreign states. Mandela, convinced that he and the other defendants would be sentenced to death, decided not to defend himself. He chose to use the trial as a platform to publicize the cause for freedom. Mandela waived his right to present direct testimony and appeal any conviction. Instead, he read a carefully prepared four-hour statement from the

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<sup>156</sup> MANDELA, *supra* note 3, at 236–39.

<sup>157</sup> *Id.* at 585–86.

dock. He surprised the prosecution by admitting key charges and spending most of his time justifying the actions by MK and ANC and why he shifted from nonviolent to violent approaches. The Trial engendered much international condemnation including by the United Nations Security Council.<sup>158</sup>

-1969–1977. *Black Consciousness Movement* (BCM) marked by the formation of the South African Student Organization in 1969 and co-founded by activist Steve Biko, transformed student discontent into a political force and shifted attention from the ANC priority on non-racialism to black pride, black self-reliance, black psychological liberation, and black leaders

Through a movement based on black power, blacks actively opposed the apartheid government during the 1970s. The Movement spurred a new era of activism in the face of aggressive clamping down by the Nationalist Government, culminating in Biko's brutal September 1977 death in police custody. His death attracted international attention and unleashed new protests within and outside of South Africa.<sup>159</sup>

-1976. *Soweto Student Uprising* triggered violent protests and mass resistance to apartheid throughout South Africa. The uprising erupted in June 1976 when high school students protested against introduction of Afrikaans as the medium of instruction. This language of the governing white minority was viewed as the language of the oppressor. Resistance was brewing aided by the Black Consciousness Movement along with other developments. The violence on the first day spread quickly and casualties mounted for the rest of the year. The Uprising provoked an international outcry that was fueled by the now iconic photograph of the dying 12-year-old Hector Pieterse being carried by a distressed fellow student. The Government's forceful

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<sup>158</sup> *Id.* at 360–78.

<sup>159</sup> *Black Consciousness Movement*, SOUTH AFRICAN HISTORY ONLINE, <http://www.sahistory.org.za/20th-century-south-africa/black-consciousness-movement> (last visited Apr. 10, 2016). See *Black Consciousness Movement*, SOUTH AFRICA: OVERCOMING APARTHEID, BUILDING DEMOCRACY, <http://overcomingapartheid.msu.edu/multimedia.php?id=65-259-11> (last visited Apr. 10, 2016).

repression of protests exposed the Government's disintegrating ability to govern.<sup>160</sup>

-1985. *Mandela Rejected President Botha's Offer* to be released if Mandela would denounce violence. Botha made this conditional offer to Mandela after twenty-one years of confinement, as violence reigned in South Africa, pressure mounted abroad, and the country became barely governable. Botha presented the proposal in Parliament and tried to put the onus of violence on Mandela as well as his fate when Botha said that it is no longer "the South Africa government which now stands in the way of Mr. Mandela's freedom. It is he himself."<sup>161</sup> This offer was the sixth conditional offer for his release in ten years.

Mandela's daughter, Zindzi, read Mandela's reply at a public rally. It was the first time Mandela's words were legally heard in more than twenty years. Mandela not only refused to reject violence, he unambiguously justified the benefits of an armed struggle by the ANC, explaining that other forms of resistance were unavailable. He then shifted the onus of violence to Botha when he called on him to renounce violence and dismantle apartheid.

-1983–1990. *United Democratic Front (UDF)*, a coalition of organizations, did much to make South Africa ungovernable while the ANC was banned.<sup>162</sup> The UDF was formed in response to President Botha's initiative to form a tricameral parliament, in which coloureds, Indians, and whites would "vote separately for racially segregated "houses" of parliament."<sup>163</sup>

The majority of Africans would be put into "Bantustans" or "independent homelands," where they would be allowed to vote only for a national government in that Bantustan.<sup>164</sup> The UDF mobilized people and organizations

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<sup>160</sup> *The June 16 Soweto Youth Uprising*, SOUTH AFRICAN HISTORY ONLINE, <http://www.sahistory.org.za/topic/june-16-soweto-youth-uprising> (last visited Apr. 10, 2016). See *Soweto Student Uprising*, SOUTH AFRICA: OVERCOMING APARTHEID, BUILDING DEMOCRACY, <http://overcomingapartheid.msu.edu/sidebar.php?id=65-258-3> (last visited Apr. 10, 2016).

<sup>161</sup> MANDELA, *supra* note 3, at 521.

<sup>162</sup> *Origins of the United Democratic Front*, SOUTH AFRICAN HISTORY ARCHIVE, <http://www.saha.org.za/udf/origins.htm> (last visited Apr. 10, 2016).

<sup>163</sup> *Against Botha's Deal*, SOUTH AFRICAN HISTORY ARCHIVE, [http://www.saha.org.za/udf/bothas\\_deal.htm](http://www.saha.org.za/udf/bothas_deal.htm) (last visited Apr. 10, 2016).

<sup>164</sup> *Id.*

across the country and “called for the creation of a united, non-racial, non-sexist, and democratic South Africa.”<sup>165</sup>

More than 600 organizations from across South Africa, including labor, political, youth, women, religious, civic, and student and teacher organizations,<sup>166</sup> joined the UDF’s movement to oppose the apartheid government and its policies.<sup>167</sup> The National Executive Committee stated, “the strength of the UDF lies in the democratic nature of its composition . . . . These organizations represent people of all colours and creeds from all strata of South African society.”<sup>168</sup> The UDF organized consumer boycotts and stay-aways, a “one million signature campaign” to oppose the new proposed form of government, and “created local structures which played key roles in the political education and mobilization of the masses,” among other things.<sup>169</sup>

The Government believed that the ANC created the UDF<sup>170</sup> and therefore restricted it, including subjecting the organization to the state of emergency and its members to arrests. However, UDF ultimately was not viewed as a creation of or controlled by the ANC.<sup>171</sup> “From the outset it was clear that the UDF preferred to be the heir, rather than a clone, of the ANC.”<sup>172</sup>

-1960–1990. *International Sanctions and Economic and Political Isolation*, dating back to the Sharpeville Massacre, escalated as each momentous chapter unfolded. The negative impact of the sanctions was evident when in early discussions after Mandela’s release, de Klerk asked Mandela to “mute the call for the continuation of

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<sup>165</sup> *Black Consciousness Movement*, *supra* note 159.

<sup>166</sup> Zac Yacoob, *List of Organisations Which Support and are Affiliates of the regional United Democratic Front*, AFRICAN NAT’L CONG., <http://www.anc.org.za/show.php?id=3802> (last visited Apr. 10, 2016).

<sup>167</sup> Pdraig O’Malley, *United Democratic Front (UDF)*, NELSON MANDELA FOUND., <https://www.nelsonmandela.org/omalley/index.php/site/q/031v02424/041v02730/051v03188/061v03222.htm> (last visited Apr. 10, 2016).

<sup>168</sup> National Executive Committee of the United Democratic Front, *Statement of the UDF National Executive Committee on the National Launching of the UDF*, AFRICAN NAT’L CONG., <http://www.anc.org.za/show.php?id=3795&t=United%20Democratic%20Front> (last visited Apr. 10, 2016).

<sup>169</sup> O’Malley, *supra* note 5. See *Consumer Boycotts*, SOUTH AFRICAN HISTORY ARCHIVE, [http://www.saha.org.za/udf/consumer\\_boycotts.htm](http://www.saha.org.za/udf/consumer_boycotts.htm) (last visited Apr. 10, 2016).

<sup>170</sup> Raymond Suttner, *Legacies and Meanings of the United Democratic Front (UDF) Period for Contemporary South Africa*, in *FROM NATIONAL LIBERATION TO DEMOCRATIC RENAISSANCE IN SOUTHERN AFRICA* 59–81 (Cheryl Hendricks & Lwazi Lushaba eds., 2005).

<sup>171</sup> O’Malley, *supra* note 5.

<sup>172</sup> Suttner, *supra* note 170.

international sanctions.” Mandela thought that “...in our view sanctions remained the best lever to force him to do more....I explained to Mr. de Klerk that we could not tell our supporters to relax sanctions until he completely dismantled apartheid and a transitional government was in place.”<sup>173</sup>

The United Nation’s General Assembly and the Security Council adopted a succession of resolutions that condemned apartheid and progressively isolated South Africa. The first Security Council resolution, in 1960, denounced the actions of the South Africa government in the wake of the Sharpeville Massacre and called for abandonment of apartheid and racial discrimination. Several years later, the General Assembly and the Security Council, with Great Britain, U.S., France, and Brazil abstaining, urged South Africa to end the Rivonia Trial and grant amnesty to the defendants. Over twenty-nine years, resolutions called for arms embargo, oil embargos, suspending cultural, educational, sporting, and other exchanges, voiding South Africa’s racist constitution, and negotiating to end apartheid, with the last resolution adopted two months before Mandela’s release.<sup>174</sup>

Through a string of resolutions and decisions by the General Assembly, the UN also effectively removed South Africa from UN membership from 1970, when it would not approve the credentials of the South African delegation, until June 1994, when it formally approved them.<sup>175</sup>

Anti-apartheid boycott and disinvestment campaigns took hold in the United States in the 1970s and 1980s as well as in the United Kingdom and

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<sup>173</sup> MANDELA, *supra* note 3, at 582.

<sup>174</sup> *The United Nations: Partner in the Struggle Against Apartheid*, NELSON MANDELA INT’L DAY, <http://www.un.org/en/events/mandeladay/apartheid.shtml> (last visited Apr. 10, 2016). See Douglas Linder, *Behind the Scenes: International Pressure on South Africa to Not Execute Nelson Mandela and Other Rivonia Defendants*, <http://law2.umkc.edu/faculty/projects/ftrials/mandela/behindscenes.html> (last visited Apr. 10, 2016).

<sup>175</sup> The General Assembly in 1970 did not approve the credentials of South Africa’s representatives; in 1973, it declared that the South African regime had no right to represent its people; in 1974, it would not accept the credentials of the representatives of South Africa, even though the Security Council failed to recommend expelling South Africa from the UN due to the vetoes by France, United Kingdom, and the United States. The President of the Assembly interpreted refusing credentials as tantamount to barring the delegation from participating, and his ruling was upheld by the General Assembly; and in 1974, it recommended that the South African regime be totally excluded from participation in all international organizations under the auspices of the UN. See *United Nations and Apartheid Timeline 1946–1994*, SOUTH AFRICAN HISTORY ONLINE, <http://www.sahistory.org.za/topic/united-nations-and-apartheid-timeline-1946-1994> (last visited Apr. 10, 2016).



other nations. The U.S. campaigns induced U.S. campuses, cities, and states to disinvest in companies doing business in South Africa. In 1986, the U.S. federal government joined the boycotts when Congress overrode President Reagan's veto and banned new investment and bank loans in South African businesses, barred a range of imports, imposed embargos on particular exports like oil and munitions, and cancelled landing rights.<sup>176</sup>

### *People*

In addition to these significant events, as pointed out in the text of this article, numerous anti-apartheid leaders and sympathizers acted boldly and at great personal risk to inflict a negative BATNA. Only a few of the courageous leaders are mentioned here, although many more made profound contributions including people below the public radar screen.

-*Chief Albert Luthuli* became President of the ANC in 1952 and moved the organization into a more activist role as the Defiance Campaign spread. He was awarded the 1960 Nobel Peace Prize for his role in the nonviolent struggle against apartheid. He was the first African and also the first person from outside Europe to be awarded the prize.<sup>177</sup>

-*Oliver Tambo* helped revive the ANC in the early 1940s and opened a law practice with Nelson Mandela. When banned, he became a "Mission in Exile" and a central ANC leader. He actively built support for the ANC's cause in Africa, United Kingdom, Russia, China, the U.S., and with political and business leaders around the world. He led the ANC in exile while Nelson Mandela was in prison.<sup>178</sup>

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<sup>176</sup> *A Struggle From the Ground Up: The Anti-Apartheid Movement in South Africa*, TAVAANA, <https://tavaana.org/en/content/struggle-ground-anti-apartheid-movement-south-africa> (last visited Apr. 10, 2016); Arianna Lissoni, *The Anti-Apartheid Movement, Britain and South Africa: Anti-Apartheid Protest vs Real Politik*, AFRICAN NAT'L CONG., <http://www.anc.org.za/show.php?id=5695> (last visited Apr. 10, 2016); *The Anti-Apartheid Movement of the 1960s*, FORWARD TO FREEDOM, <http://aamarchives.org/history/1960s/79-history/124-the-anti-apartheid-movement-in-the-1960s.html#> (last visited Apr. 10, 2016).

<sup>177</sup> *Chief Albert John Luthuli*, SOUTH AFRICAN HISTORY ONLINE, <http://www.sahistory.org.za/people/chief-albert-john-luthuli> (last visited Apr. 10, 2016).

<sup>178</sup> *Oliver Reginald Tambo*, SOUTH AFRICAN HISTORY ONLINE, <http://www.sahistory.org.za/people/oliver-reginald-tambo> (last visited Apr. 10, 2016).

-*Walter Sisulu*, active with ANC early, helped lead the Defiance Campaign and transform the ANC into a mass-based militant national organization. He worked with Nelson Mandela and others to form MK and became part of its High Command as political commissar when Mandela became its Commander in Chief. Along with Mandela, he was sentenced to life in prison in the Rivonia Trial and sent to Robben Island. He became part of the underground political leadership at Robben Island, known at the “High Organ.”<sup>179</sup>

-*Stephen Biko*, co-founder of the *Black Consciousness Movement* (BCM), did much to generate black pride and protests as described above under the Events section and his brutal death made him an international martyr in opposing apartheid.<sup>180</sup>

-*Winnie Mandela*, Nelson’s wife, was an energetic force in the anti-apartheid movement, especially when her husband was in prison. During President Botha’s regime, her opposition earned her the title of the “Mother of the Nation.” For her activities, she was tortured, harassed, banned, separated from her children, held in solitary confinement for eighteen months, and exiled to a remote area of South Africa. She also was controversial among sympathisers. She endorsed the practice of necklacing (burning people alive using tires and petrol) and was charged with ordering her body guards, known as Mandela United Football club, to kidnap and murder suspected police informers including 14-year-old Stompie Seipei, the most notorious case.<sup>181</sup>

-*George Bizos*, a human rights lawyer served as Nelson Mandela’s personal attorney throughout much of his life. He co-represented Mandela in the Rivonia Trial. As his attorney, he was one of the few people who could visit Mandela when in prison and as a result was a vital link between Mandela and the outside world.<sup>182</sup>

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<sup>179</sup> *Walter Ulyate Sisulu*, SOUTH AFRICAN HISTORY ONLINE, <http://www.sahistory.org.za/people/walter-ulyate-sisulu> (last visited Apr. 10, 2016).

<sup>180</sup> *Stephen Bantu Biko*, SOUTH AFRICAN HISTORY ONLINE, <http://www.sahistory.org.za/people/stephen-bantu-biko> (last visited Apr. 10, 2016).

<sup>181</sup> *Winnie Madikizela-Mandela*, SOUTH AFRICAN HISTORY ONLINE, <http://www.sahistory.org.za/people/winnie-madikizela-mandela> (last visited Apr. 10, 2016).

<sup>182</sup> *George Bizos*, SOUTH AFRICAN HISTORY ONLINE, <http://www.sahistory.org.za/people/george-bizos> (last visited Apr. 10, 2016). *See*

-*Albie (Albert) Sachs*, human rights lawyer who participated in the Defiance Campaign, helped draft the Freedom Charter, and defended people charged under apartheid racist laws. He worked closely with Oliver Tambo. He was banned, subject to solitary confinement without trial, and went into exile in 1966. In 1988, when a car bomb was planted by South African police, he lost an arm and sight in one eye. He was one of the chief architects of the post-apartheid constitution and was appointed by Mandela to serve on the newly established Constitutional Court.<sup>183</sup>

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*generally* GEORGE BIZOS, ODYSSEY TO FREEDOM: A MEMOIR BY THE WORLD-RENOWNED HUMAN RIGHTS ADVOCATE, FRIEND AND LAWYER TO NELSON MANDELA (2009).

<sup>183</sup> *Judge Albert Louis "Albie" Sachs*, SOUTH AFRICAN HISTORY ONLINE, <http://www.sahistory.org.za/people/judge-albert-louis-albie-sachs> (last visited Apr. 10, 2016).

## APPENDIX B: THE SECRET PRISON NEGOTIATIONS

Nelson Mandela's represented in his remarks at Cape Town when he was released that:

Today, I wish to report to you that my talks with the government have been aimed at normalizing the political situation in the country. We have *not as yet begun discussing the basic demands of the struggle*. I wish to stress that *I myself had at no time entered into negotiations about the future of our country*, except to insist on a meeting between the ANC and the Government.<sup>184</sup>

*The Secret Negotiations*

As concluded in the text, Mandela's statement misrepresented that he had not entered into negotiations with the Government while in prison. This conclusion is supported by the description of the secret negotiations in this Appendix.

During the early 1980s, the Government began sending feelers to release Nelson Mandela if he would meet particular conditions including denouncing violence. The Government seemed to be testing Mandela in order to learn what he was willing to trade for his freedom. The feeler that morphed into the secret prison negotiations was extended by Kobie Coetsee, the Minister of Justice, in 1985.<sup>185</sup>

Coetsee briefly visited Nelson Mandela in a Cape Town hospital when he was hospitalized for a routine surgical medical procedure for an enlarged prostate. Coetsee's visit was unexpected and "amazed" Mandela because Coetsee had not responded to Mandela's prior written efforts to set up talks between the ANC and the Government. The cordial and informal exchange in the hospital was viewed as a signal by Mandela. He thought that, "The government, in its slow and tentative way, was reckoning that they had to

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<sup>184</sup> Padraig O'Malley, *Remarks by Nelson Mandela in Cape Town on February 11, 1990 After His Release From Victor Verster*, NELSON MANDELA FOUND., <https://www.nelsonmandela.org/omalley/index.php/site/q/03lv03445/04lv04015/05lv04154/06lv04191.htm> (last visited Apr. 10, 2016) (emphasis added).

<sup>185</sup> MANDELA, *supra* note 3, at 523–31. Mandela described this visit and what he did soon afterwards to try to initiate discussions with the Government.

come to some accommodation with the ANC. Coetsee's visit was an olive branch."<sup>186</sup>

When Mandela was discharged from the hospital, officials did not return him to the shared facilities with his three comrades in Pollsmoor prison. Instead, he was moved into a ground floor section in the prison, with three rooms and a separate toilet for his exclusive use. For the first time since being incarcerated, he was isolated, and by prison standards, living in "palatial" conditions. He realized that these new circumstances gave him the freedom to try initiating discussions with the Government, and he could do so confidentially.

Mandela recognized that both the ANC and the Government had imposed firm preconditions for negotiating that have made any offers by either side a sign of weakness and betrayal. He was facing a too common obstacle in negotiations and one that can be intractable. Something bold had to be done. Mandela launched a risky strategy especially for a leader known for his transparency and integrity.

Within a few weeks, Mandela secretly reached out to the Government by writing to Kobie Coetsee to "propose talks about talks." When he did not

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<sup>186</sup> *Id.* at 524. This pivotal visit has an interesting backstory. For Mandela, it was a total surprise, but for Coetsee, the visit was the result of two fortuitous circumstances that Mandela apparently was unaware of. A good friend of Coetsee, Piet de Waal, had serendipitously become friends with Winnie Mandela. De Waal and Coetsee's friendship dates back to their days at the University of Orange Free State. They lived in the same housing and played tennis when attending the University. De Waal later persuaded Coetsee to abandon his plans to become a teacher to go to law school and then helped Coetsee secure his first law position as an articled clerk. De Waal decided to become a small-town lawyer and moved to Brandfort—the same remote village that Coetsee's predecessor, Minister of Justice Kruger, later banished Winnie to. De Waal's wife and Winnie became close friends, and Piet de Waal, as the only attorney in town, reluctantly represented Winnie locally after he was told that he was ethically obligated to do so and had advised local authorities of his predicament. To protect his friend from harassment, Coetsee vouched for de Waal's integrity with Kruger. When Coetsee became Minister of Justice in 1980, de Waal began to lobby him cautiously and persistently to lift the ban on Winnie and consider releasing Nelson from prison. "This was the first lobbying of a cabinet minister by anyone within the Afrikaner nationalist fold, and Coetsee admits today that it had a considerable influence on him. 'You could say that's where the whole process started,' he says." SPARKS, *supra* note 10, at 19. The second fortuitous event occurred on a plane to Cape Town when Winnie Mandela was on her way to visit her husband in the hospital. Coetsee was on the same flight. He visited Mrs. Mandela in coach class to assure her of the Government's concern for her husband's health. Winnie then marched up to business class and sat next to Coetsee; they talked for much of the two-hour flight. By the time the flight arrived, Coetsee decided to visit Mandela in the hospital. *Id.* at 14–25.

respond, Mandela looked for other opportunities to reach out to the Government.

He did not tell anyone in the ANC what he was doing because he thought that they would object. He justified this daring move by concluding that sometimes “a leader must move out ahead of his flock . . . .”<sup>187</sup>

As he was making overtures to the Government and some preliminary connections, Oliver Tambo and the ANC called for the “people to render the country ungovernable.”<sup>188</sup> The people did what they could do. The state of unrest and political violence were reaching new heights and international pressure was increasing. The Government responded by imposing a state of emergency.<sup>189</sup>

Concurrently, the Government made another inconceivable change in Mandela’s prison life. Without any warning or explanation in 1986, prison officials started taking Mandela on short trips to see the city and countryside. He suspected that the trips were designed to entice him with the pleasures of small freedoms in order to induce him to make compromises to gain complete freedom. The trips also might have been designed to acclimate him to life in South Africa after his release.

For the first trip, he was driven around Cape Town. He became riveted watching people doing simple and normal activities of daily life and discovered how much he missed doing them. When the Colonel driving him around went into a store to buy Mandela a cold drink, he encountered another first in his twenty-two years of confinement. He was out of prison and unguarded. He anxiously envisioned the possibilities of escaping. Then, he realized that it would be unwise, irresponsible, and dangerous, and that they were probably testing him. He was relieved when the Colonel returned. Over the next several months, he visited Cape Town, the outskirts, the nearby mountains, and local beaches. No one recognized him. The last published picture of Mandela in South Africa dated back to 1962 when he was 44 years old. He was now 68 years old.<sup>190</sup>

Later in 1987, Mandela resumed contact with Coetsee. They met privately several times and then Coetsee made a concrete proposal to appoint a small committee of senior officials to conduct secret discussions with Mandela. Coetsee would head the committee. Although Mandela was uncomfortable with and unhappy that the chief of intelligence services, Niel Barnard, would be on the committee, he accepted the proposal.<sup>191</sup>

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<sup>187</sup> MANDELA, *supra* note 3, at 526.

<sup>188</sup> *Id.* at 529.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 525–26, 534–36.

<sup>191</sup> *Id.* at 533.

Next, Mandela consulted behind the table. He conferred with his four prison comrades, known as the High Organ (leadership) about initiating talks with the Government but he did not inform them that he had already reached out, a government committee had been formed, and he had agreed to participate. Two of his comrades objected to him initiating talks, as he feared. As these events were unfolding, he received a note from Oliver Tambo in Lusaka, Zambia about rumors that secret meetings were being held. Mandela assured him that he was only negotiating to set up a meeting between the ANC and the Government, when he was actually doing much more.

Mandela thought he had to act alone because “my colleagues . . . would condemn my proposal, and that would kill my initiative even before it was born,”<sup>192</sup> especially when the meetings included the head of the national intelligence services. Mandela thought it was time to make some hard and risky choices. Mandela believed that “There are times when a leader must . . . go off in a new direction, confident that he is leading his people the right way.”<sup>193</sup>

The first secret meeting was held in May 1988. The meetings were initially conducted weekly, then sporadically, and eventually returned to meeting weekly, for a total of forty-seven. The early meetings, like any negotiations based on good practices, focused on parties getting acquainted and exchanging information, with Mandela spending time explaining ANC’s history and positions. Mandela astutely understood the need to build relationships and credibility with people across the table before focusing on the substantive issues.

When reaching the issues, they concentrated on four that by now were thoroughly familiar to all the participants: ANC’s continuation of the armed struggle, ANC’s alliance with the Communist Party, the goal of majority rule (which was mostly about the needs of the white minority including their fears that their private property would be nationalized), and racial reconciliation. Each issue was discussed extensively during multiple meetings.

For the most intractable issue, majority rule with protections for the white minority, Mandela avoided saying simply “trust me”—the ANC is committed to democratic reforms that would unite all the people and races of South Africa. Mandela supported this commitment with a document he endorsed thirty years earlier, the 1955 Freedom Charter. It was prepared by the South African Congress Alliance that included the ANC. The Charter’s preamble begins with, “South Africa belongs to all who live in it, black and white . . .

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<sup>192</sup> *Id.* at 526.

<sup>193</sup> *Id.* See *id.* at 525–26, 534–36.

.<sup>194</sup> and the entire document is based on principles of democracy and equality. He emphasized that, “[T]he majority would need the minority. We do not want to drive you to the sea.”<sup>195</sup>

In response to their fears that the ANC and the Freedom Charter supported blanket nationalization of the economy, Mandela indicated “we” favor more even distribution of the rewards and any nationalization would occur for some industries that are already monopolies.

He pointed out that he has not changed his mind since an article he wrote in 1956 in which he said, “the Freedom Charter was not a blueprint for socialism but for African-style capitalism.”<sup>196</sup>

As the intense and secret meetings continued, the country was still in turmoil. The Government had re-imposed a state of emergency and domestic and international pressures continued to mount with companies leaving South Africa and the U.S. Congress passing a sanctions bill.

One evening in December 1988, Mandela was abruptly told to pack up his belongings and, without any explanation, driven for an hour to a new prison, Victor Verster. It turned out to be an upgrade in living conditions that was better than he had ever experienced in his lifetime. He was moved to his own house, a cottage, with a master bedroom and two guest rooms, swimming pool, personal cook, and no bars on the windows although the walls were topped with razor wire and guards were stationed at the entrance. He also could go for walks, welcome frequent visitors, and hold private discussions. He was told that this cottage would be his last home before becoming a free man. This upgrade poignantly reminded him of the harsh conditions under which he has been living for a quarter of a century and what he has been missing and longed for.<sup>197</sup>

Soon afterwards, Mandela pressed to meet personally with President Botha. Mandela prepared a memorandum to persuade Botha to meet and lay the groundwork for the meeting. Mandela again demonstrated good negotiation practices. He consulted key comrades on his side of the table

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<sup>194</sup> The Congress of the People, *The Freedom Charter*, AFRICAN NAT’L CONG., <http://www.anc.org.za/show.php?id=72> (last visited Apr. 10, 2016).

<sup>195</sup> MANDELA, *supra* note 3, at 539.

<sup>196</sup> *Id.* at 538. However, when you read the Freedom Charter, you can understand the Government’s fears. It stated that: “The national wealth of our country, the heritage of South Africans, shall be restored to the people; The mineral wealth beneath the soil, the Banks and monopoly industry shall be transferred to the ownership of the people as a whole; . . . Restrictions of land ownership on a racial basis shall be ended, and all the land re-divided amongst that who work it . . .” The Congress of the People, *supra* note 194. None of these ideas were ultimately imported into the new South Africa constitution while nearly all the other concerns in the Charter were addressed. *See id.*

<sup>197</sup> MANDELA, *supra* note 3, at 543–46.



because “Although I know I was going ahead of my colleagues, I did not want to go too far ahead and find that I was alone.”<sup>198</sup> The memorandum reflected a thoughtful negotiation approach. He wanted the President to see they “were not wild-eyed terrorists, but reasonable men.”<sup>199</sup>

He addressed the Government’s preconditions for negotiations—that the ANC renounce violence, break with the communist party, and abandon the call for majority rule. He explained how the first two issues were diverting both sides from what he saw as the central issue dividing them: how to reconcile two conflicting positions, (1) ANC’s demand to adopt majority rule. It is now apparent that Mandela’s interests in a democracy had morphed into a single position. Only when accepted, he said there would be peace and stability. Mandela described “the rejection of majority rule by the government” as “a poorly disguised attempt to preserve power.” (2) National Government’s demand to address the impact of majority rule on white South Africa. The whites are insisting “on structural guarantees that majority rule will not mean domination of the white minority by blacks.”<sup>200</sup>

He also understood how the sequencing of negotiations can affect progress when he proposed that negotiations proceed in two stages: first, conditions for negotiations must be created, and then actual negotiations can be conducted.<sup>201</sup>

In July 1989, Mandela was again starkly reminded of what he had sacrificed for the freedom struggle when celebrating his seventy-first birthday in prison. His entire family came to his cottage. It was the first time he was together with his wife, children, and grandchildren. He realized that, “It was a deep, deep pleasure to have my whole family around me, and the only pain was the knowledge that I had missed such occasions for so many years.”<sup>202</sup>

Mandela finally had his meeting with President Botha. It was his only meeting, lasted less than a half hour on July 5, 1989, and was mostly cordial. Mandela described it as a breakthrough, not in terms of the substantive negotiations but that Botha had finally “cross[ed] the Rubicon. . . . Now I felt there was no turning back.”<sup>203</sup>

As negotiations were proceeding in the face of these reminders of the missing personal pleasures, the unimaginable happened. President Botha resigned in August 1989, as a result of a stroke.<sup>204</sup> A new president and bargaining partner was sworn-in, F.W. de Klerk. Changing bargaining partners

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<sup>198</sup> *Id.* at 546.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 547.

<sup>201</sup> *Id.* at 546–47.

<sup>202</sup> *Id.* at 548.

<sup>203</sup> *Id.* at 551.

<sup>204</sup> President Botha suffered the stroke in January 1989.

can sometimes create an opportunity to move negotiations forward.<sup>205</sup> Mandela, however, had no reason to think that this was a positive development. Although the negotiations had been going slowly with Botha, de Klerk was known by the ANC as a “cipher.” “Nothing in his past seem[ed] to hint at a spirit of reform.”<sup>206</sup> This change looked like a setback.

Mandela discovered that de Klerk was a pragmatist. As Mandela continued to meet with the secret negotiation committee, he tried to channel messages to de Klerk through the committee. To Mandela’s great surprise, de Klerk began systematically dismantling many of the building blocks of apartheid, including dissolving many segregated facilities like beaches and restaurants. He also released unconditionally seven former Robben Island leaders including his close and long-term friend, Walter Sisulu. Mandela conveyed his appreciation to de Klerk. Mandela understood the importance of acknowledging progress in order to cultivate a positive negotiation relationship.

President de Klerk set up a personal meeting with Mandela for December 13, 1989. Mandela, like any good negotiator, planned for the meeting. He consulted extensively with a diverse range of colleagues including old friends and new leaders, and prepared a lengthy letter to send to de Klerk in advance of the meeting. The letter warrants a high grade for the way it set the tone, addressed candidly controversial issues, and framed an agenda that considered both sides’ priorities.<sup>207</sup>

He began the letter by praising President de Klerk for recently freeing political prisoners, and then quickly moved ahead to identify conditions for creating a “proper climate for negotiations.” Throughout the letter, he meticulously presented his rationales for key points in contention.

The Government had persistently conditioned negotiations on ANC suspending the armed struggle. Mandela understood that he had to address the Government’s priority in a way that might be acceptable to both sides. He justified the ANC’s armed struggle as “purely a defensive measure against the violence of the government.” He gave this issue a sense of urgency while framing it as a joint one when he stressed that, “[A] mutually agreed-upon

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<sup>205</sup> ROBERT H. MNOOKIN, SCOTT R. PEPPET & ANDREW S. TULUMELLO, *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES*, 218–20 (2000).

<sup>206</sup> MANDELA, *supra* note 3, at 551. *See also* MEREDITH, *supra* note 9, at 393–95 (highlighting in detail de Klerk’s conservative credentials when he was elected president).

<sup>207</sup> Pádraig O’Malley, ‘*A Document to Create a Climate of Understanding*’; *Nelson Mandela to F.W. de Klerk 12 December 1989*, NELSON MANDELA FOUND., <https://www.nelsonmandela.org/omalley/cis/omalley/OMalleyWeb/031v01538/041v01600/051v01640/061v01644.htm> (last visited Apr. 10, 2016).

cease-fire to end hostilities ought to be the first order of business, for without that, no business could be conducted.”<sup>208</sup>

He forewarned de Klerk how Mandela viewed the Government’s proposal for group rights. He characterized it as a “disguised form of minority rule” under which whites would “hold firmly and defiantly to power and enforce racial separation.” It would make meaningless all talk of reconciliation and justice.

He gave de Klerk encouragement. He labeled as “important” de Klerk’s statement on reconciliation and “seeking mutually acceptable solutions” set out in his inaugural address to Parliament. He described the message as having a “formidable impact inside and outside the country.” These words imbued South Africans and the rest of the world with hope for the birth of a new South Africa. Mandela repeated his primary interest when he said the “very first step toward reconciliation is obviously dismantling apartheid . .

..”<sup>209</sup>

Mandela linked de Klerk’s call for reconciliation to the country’s future. Mandela wrote:

By reconciliation, in this context, was understood the situation where opponents, and even enemies for that matter, would sink their differences and lay down their arms for the purpose of working out a peaceful solution, where the injustices and grievances of the past would be buried and forgotten, and a fresh start made.<sup>210</sup>

He alerted de Klerk to Mandela’s concern that the spirit of the inaugural speech has not been in action lately,<sup>211</sup> a comment that may be true as a good practice or posturing as a tactic. Only de Klerk can determine whether Mandela’s statement can be justified or was a negotiation ploy that lacked merit. .

Mandela tried to introduce an objective standard, as any good negotiator should do when facing a distributive conflict. A standard that is independent of the parties can become the basis for overcoming a conflict. Mandela cited a detailed negotiation plan formulated by the ANC and approved by the

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<sup>208</sup> MANDELA, *supra* note 3, at 554. In the letter, he wrote: “Equally important is the fact that there is a war between the ANC and the Government, and a cease-fire to end hostilities will have to be negotiated first, before talks to normalise the situation can begin.” O’Malley, *supra* note 207.

<sup>209</sup> MANDELA, *supra* note 3, at 554.

<sup>210</sup> O’Malley, *supra* note 207.

<sup>211</sup> MANDELA, *supra* note 3, at 554.

Frontline States,<sup>212</sup> the Non-Aligned Countries Conference, and almost all the members of the Commonwealth of Nations. The plan was known as the Harare Declaration of 1989.<sup>213</sup> It put the burden on the Government to eliminate negotiation obstacles that it created.<sup>214</sup> It recognized that peace and stability was possible only when the system of apartheid has been eradicated and South Africa has been transformed into a “united, democratic and non-racial state.” It set out pre-conditions for negotiations (release prisoners, lift bans, end state of emergency, etc.) and guidelines (transition to a democratic order, free elections, etc.).<sup>215</sup>

At the time the negotiation plan was cited in the letter, however, it lacked the full persuasive power of an objective standard. It had not yet been adopted by a body independent of both sides. It was initially endorsed by sympathetic groups. The Harare Declaration achieved objective standard status the day after the December 13th meeting when it was adopted by the United Nations.<sup>216</sup> The letter was delivered to Mr. de Klerk the day before their meeting.

At the meeting, Mandela was surprised when he found de Klerk listening and trying to understand his point-of-view. He wrote, “This was a novel experience.”<sup>217</sup> He appreciated the feeling that he was being heard—a well-recognized prerequisite for moving forward in negotiations. He noted that his predecessors spent their time talking and trying to persuade rather than listening and trying to understand.

Mandela addressed one of the Government’s major proposals for meeting its interests, the “group rights” proposal. Mandela clearly opposed it in his

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<sup>212</sup> A group of southern African states that formed a subcommittee of the Organization of African Unity, an organization of newly independent African states.

<sup>213</sup> The Harare Declaration (first formal proposals by ANC on how to move forward to a negotiated settlement) was based on what ANC leaders learned during a dozen secret meetings between ANC leaders and Afrikaners who were deep inside the nationalist establishment. The high level meetings were primarily held in Mells, England from 1987–1990 and became known at the Mells Meetings facilitated by Mike Young, a private businessman with considerable political experience. See SPARKS, *supra* note 10, at 87, 66–87.

<sup>214</sup> MANDELA, *supra* note 3, at 554.

<sup>215</sup> Organisation of African Unity, *Harare Declaration: Declaration of the OAU Ad-hoc Committee on Southern African on the question of South Africa*, AFRICAN NAT’L CONG., <http://www.anc.org.za/show.php?id=3856> (last visited Apr. 10, 2016). See ENUGA S. REDDY, ROAD TO DEMOCRACY IN SOUTH AFRICA: VOLUME 3, 41–140 (2008).

<sup>216</sup> G. A. Res. 16/1, U.N. Doc. A/RES/S-16/1 (Dec. 14, 1980), <http://www.un.org/documents/ga/res/spec/aress16-1.htm>.

<sup>217</sup> MANDELA, *supra* note 3, at 554.

letter but he did not simply dismiss it during the meeting. He engaged in a discussion of its merits, another good negotiation practice.

He explained how the proposal that no racial or ethnic group could take precedence over any other appeared to preserve white domination. He said the ANC did not struggle against apartheid for seventy-five years to defer to a disguised form of it. He also cited for support a persuasive source independent of him. Mandela quoted an editorial in a newspaper that was a mouthpiece of the de Klerk's Nationalist Party. The editorial suggested that the group rights concept was "an attempt to bring back apartheid through the back door." Mandela said that if the paper of de Klerk's party perceived the proposal that way, he asked, rather than lectured, "[H]ow did he think we regarded it?"<sup>218</sup> As any accomplished negotiator knows, citing independent sources respected by the other side and asking questions to engage the other side can be more persuasive than making partisan arguments.

Mandela recognized the good negotiation practice of de Klerk when he did not argue with Mandela. Instead, de Klerk articulated the underlying interests motivating the group rights proposal while recognizing shared interests. He said, "You know my aim is no different than yours. Your memo to P.W. Botha said the ANC and the government should work together to deal with white fears of black domination, and the idea of 'group rights' is how we propose to deal with it."<sup>219</sup> Mandela was impressed with this thoughtful reply.

Mandela had to find a way to meet the other side's interests, to some extent, as any astute negotiator knows. When de Klerk raised shared interests in the whites being part of the country's future, Mandela was ready to work with de Klerk to jointly explore how to address this common concern, which they tried to do later when preparing an interim constitution.<sup>220</sup>

Mandela next brought up the question of his freedom, and it is clear that Mandela was then in a strong bargaining position to negotiate his terms of release.<sup>221</sup> The country was ungovernable and internationally isolated. Key political prisoners had already been released. Mandela was living in relative comfort in his private prison cottage where he was told that this place would be his last one before being freed. If you have any doubt that the bargaining dynamic had changed, read the letter Mandela sent to de Klerk in advance of this meeting. The letter was confidently and forcefully written. He did not mince his words as he articulated conditions and terms necessary for any negotiated resolution.<sup>222</sup> Also, consider the unusual negotiation that took place

<sup>218</sup> *Id.* at 555.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at 555, 568.

<sup>221</sup> MNOOKIN, *supra* note 2, at 126.

<sup>222</sup> MANDELA, *supra* note 3, at 553–54.

two months later when de Klerk informed Mandela that he would be freed the next day. In what is now viewed as a historically comical exchange, Mandela, as a prisoner, tried to negotiate for another week in prison to properly prepare for his own release while de Klerk, as the jailer, wanted him to leave the next day.<sup>223</sup>

Mandela used this discussion about his release as an opportunity to make the case for unbanning the ANC, lifting the state of emergency, releasing political prisoners, and allowing exiles to return. If de Klerk did not unban the ANC, Mandela reminded him that Mandela would be working for an illegal organization and “you must simply re-arrest me after I walk through those gates.”<sup>224</sup> This re-arrest reframing helped de Klerk see the dispute from an unappealing perspective. If these changes were not made, Mandela’s freedom and any resulting positive world reactions would be short-lived. It evoked the unworkable status quo.

There were no surprises in the exchanges and the meeting ended as expected, as an exploratory one. President de Klerk said, “he would take all that [Mandela] said under consideration . . . .”<sup>225</sup> Mandela left the meeting thinking “Mr. de Klerk seemed to represent a true departure from . . . the past. . . . and was a man we could do business with.”<sup>226</sup>

Less than two months later, President de Klerk stunned the country and the world on February 2, 1990, when he gave his now famous unbanning speech in which he met Mandela’s key preconditions for negotiations and announced that he would be released unconditionally.<sup>227</sup>

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<sup>223</sup> *Id.* at 557–58.

<sup>224</sup> *Id.* at 556.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *See supra* Part III.D.